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No. ——

IN THE
# Supreme Court of the United States
OCTOBER TERM, 1997

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CHAPARRAL STEEL COMPANY,
*Petitioner,*

v.

STATE OF TEXAS,
*Respondent.*

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**On Petition for a Writ of Certiorari to the Tenth Court of Appeals for the State of Texas**

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## PETITION FOR WRIT OF CERTIORARI

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## QUESTION PRESENTED

Whether, contrary to this Court's holding in *Gade v. National Solid Wastes Management Association*, the State of Texas may regulate an issue already covered by federal occupational safety and health standards, and assess an additional twenty-million dollar penalty, by applying a railroad clearance statute that it has never enforced and never submitted for approval by the Secretary of Labor.

## LIST OF RELATED PARTIES
## (SUPREME COURT RULE 29.1)

Chaparral Steel Company discloses the following related entities as required by Supreme Court Rule 29.1: Chaparral Steel Texas, Inc.; Chaparral Steel Midlothian, L.P.; Chaparral Steel Trust; Chaparral Steel Holdings, Inc.; Texas Industries, Inc.

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## PETITION FOR WRIT OF CERTIORARI

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### PRAYER

Chaparral Steel Company respectfully petitions for a writ of certiorari to review the judgment of the Tenth Court of Appeals for the State of Texas in this case.

### OPINIONS BELOW

The opinions of the Tenth Court of Appeals for the State of Texas, Case No. 10-97-013-CV (App. B, *infra*, 3a-9a), and the District Court of Ellis County, Texas (40th Judicial District), Case No. 50334 (App. C, *infra*, 10a-11a), are unreported.

### JURISDICTION

The Tenth Court of Appeals for the State of Texas issued its judgment on July 9, 1997. App. B, *infra*, 9a.

The Supreme Court of Texas issued its order denying review of the judgment on February 13, 1998. App. A, *infra*, 1a. The jurisdiction of this Court is invoked under 28 U.S.C. § 1257.

## STATUTES AND REGULATIONS INVOLVED

Section 18(c) of the federal Occupational Safety and Health Act requires any state wishing to develop and assume responsibility for the enforcement of occupational safety and health standards on an issue already covered by a federal standard to submit a "State plan for the development of such standards and their enforcement." 29 U.S.C. § 667(b).

Petitioner Chaparral Steel Corporation was cited by the federal Occupational Safety and Health Administration for a condition violating two federal standards: the federal "general duty" standard set out at 29 U.S.C. § 654(a) and the "safety instruction signs" standard set out at 29 C.F.R. § 1910.145(c)(3). The State of Texas later cited Chaparral Steel Coporation for the *same* condition under the Texas Railroad Clearance Act, Tex. Rev. Civ. Stat. Ann. art. 6559b. The Attorney General of the State of Texas has brought this suit to enforce the state-law citation and to collect penalties under Tex. Rev. Civ. Stat. Ann. art. 6559e.[1]

## STATEMENT OF THE CASE

### A. Factual Background

On November 9, 1991, an employee was fatally injured when pinned betwee a boxcar and a retaining wall at petitioner Chaparral Steel Company's facility in Midlothian, Texas. This case arises out of independent state and federal investigations following that incident.

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[1] The statutes and regulations involved in this case are contained in the Appendix pursuant to Supreme Court Rules 14.1(f) and 14.1(k). App. D-F, *infra*, 12a-29a.

Conditions surrounding the 1991 injury were first investigated by the federal Occupational Safety and Health Administration ("OSHA"). After completing its investigation, OSHA assessed two separate penalties against Chaparral Steel Company ("Chaparral") for violation of federal workplace standards. The first penalty cited Section 5(a)(1) of the federal Occupational Safety and Health Act (the "OSH Act"), 29 U.S.C. § 654(a)(1), which requires employers to provide a workplace "free from recognized hazards that are causing or are likely to cause death or serious physical harm." The second penalty cited violation of 29 C.F.R. 1910.145(c)(3), "Safety Instruction Signs", and alleged that "safety instruction signs were not used where there was a need . . . to instruct employees of hazard of being caught between moving box cars and the retaining wall." App. G, *infra,* 30a-31a.

After issuing the federal citations, OSHA filed an administrative complaint with the federal Occupational Safety and Health Review Commission ("OSHRC") seeking to enforce the penalties it had assessed against Chaparral for violating federal workplace standards. On May 10, 1993, the OSHRC entered a stipulated order requiring Chaparral to (i) implement an "absolute work rule" prohibiting employees from occupying designated areas while rail boxcars are present, (ii) train employees regarding similar hazards, and (iii) install warning signs alerting employees to potential hazards. The order also required Chaparral to pay monetary penalties resulting from the citations. App. H, *infra,* 33a-37a.

After OSHA had initiated its investigation of the 1991 incident, the Texas Railroad Commission began its own independent investigation of facts surrounding the injury. The state commission determined that the very same condition cited by OSHA—minimal clearance between a retaining wall and the rail track—also violated the Texas Railroad Clearance Act, Tex. Rev. Civ. Stat. Ann. art. 5669b. That law, enacted in 1925, had never before been enforced by the Railroad Commission or used to regulate

workplace safety by it in the State of Texas. The state nonetheless filed suit on September 23, 1993, seeking to recover over twenty million dollars in penalties under Tex. Rev. Civ. Stat. Ann. art. 5669e: $1000 for every day that Chaparral did not comply with the Texas Raiload Clearance Act.

### B. The OSH Act's Preemption of Non-Approved State Law

The federal Occupational Safety and Health Act, 29 U.S.C. § 651, *et seq.*, provides a comprehensive nationwide plan to protect the health and safety of "every working man and woman" and largely preempts the field of occupational safety and health. 29 U.S.C. §§ 651(b), 667. The OSH Act delegates to the Occupational Safety and Health Administration authority to promulgate nationwide safety and health standards. 29 U.S.C. § 655(a). While the OSH Act allows states to enact standards where "no standard is in effect", it specifically provides that:

> Any State which, at any time, desires to assume responsibility for development and enforcement therein of occupational safety and health standards relating to any occupational safety or health issue with respect to which a Federal standard has been promulgated under section 655 of this title shall submit a State plan for the development of such standards and their enforcement.

29 U.S.C. § 667(b). A proposed state plan cannot win approval unless it designates an enforcing agency, provides for the development and enforcement of standards "at least as effective" as federal standards, assures that the state will devote adequate funds and personnel to administer and enforce the plan, and requires reports to OSHA from both employers and the designated state agency. 29 U.S.C. § 667(c).

The OSH Act is therefore unlike many federal laws allowing supplemental state regulation so long as the state

law does not actually conflict with federal standards. In fact, when it enacted the OSH Act, Congress specifically rejected proposals that would have preempted only state regulations "in conflict" with federal law. For example, the Senate declined to include language allowing states to adopt any "standard which provides for more stringent health and safety regulations than do the federal standards."[2] Federal courts interpreting these sections of the OSH Act, 29 U.S.C. §§ 651(b) and 667, have regularly concluded that they preempt state occupational and safety standards on any issue for which OSHA has promulgated a standard unless the state has obtained approval for its plan from the United States Department of Labor.[3]

This Court recently extended OSH Act preemption to non-approved state standards "relating to" any occupational safety or health issue with respect to which a federal standard has been promulgated. Justice O'Connor explained that requiring states to follow an "all or nothing" approach protected Congress' intent that a single set of standards apply to any particular workplace safety issue:

> The design of the statute persuades us that Congress intended to subject employers and employees to only one set of regulations, be it federal or state, and that the only way a State may regulate an OSHA-regulated occupational safety and health issue is pursuant to an approved state plan that displaces the federal standards.
>
> . . .
>
> The OSH Act as a whole evidences Congress' intent to avoid subjecting workers and employers to dupli-

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[2] S. 2193, § 17(h), *reprinted in* 116 Cong. Rec. 37637 (1970); *see also* S. 2799 and H.R. 13373, 91st Cong., 1st Sess. § 14(b)(1) (1969), *reprinted in Legislative History of the Occupational Safety and Health Act of 1970* (Committee Print, 1971), at 58, 706.

[3] *See, e.g., Associated Industries of Massachusetts v. Snow*, 898 F.2d 274, 278 (CA1 1990); *Environmental Encapsulating Corp. v. New York City*, 855 F.2d 48, 55 (CA2 1988); *United Steelworkers of America v. Auchter*, 763 F.2d 728, 736 (CA3 1985).

> cative regulation; a State may develop an occupational safety and health program tailored to its own needs, but only if it is willing completely to displace the applicable federal regulations.
>
> . . .
>
> To allow a State selectively to "supplement" certain federal regulations with ostensibly nonconflicting standards would be inconsistent with the federal scheme of establishing uniform federal standards, on the one hand, and encouraging States to assume full responsibility for development and enforcement of their own OSH programs, on the other.

*Gade v. Nat'l Solid Waste Mgmt. Ass'n*, 505 U.S. 88, 99, 100, 103 (1992) (O'Connor, J., plurality). Justice Kennedy concurred with the plurality's analysis but argued that Congress had *expressly* preempted all state laws relating to any occupational safety or health issue with respect to which a federal standard exists. *Id.*, 505 U.S. at 111 (Kennedy, J., concurring).

The question presented here concerns whether the State of Texas, which has not submitted its Railroad Clearance Act to the United States Department of Labor for approval under 29 U.S.C. § 667(b), can apply that law to supplement federal workplace safety standards despite OSHA's findings and a final OSHRC order regarding the 1991 incident at Chaparral's Midlothian, Texas facility.

**C. Proceedings Below**

The State of Texas initially filed suit in the District Court for Travis County, Texas, on January 15, 1993. The case was later transferred to the District Court for Ellis County, Texas.

On October 10, 1995, the State of Texas filed a *Motion for Partial Summary Judgment* seeking judgment against Chaparral's affirmative defense that the Texas Railroad Clearance Act was preempted by federal law. On Novem-

ber 3, 1995, Chaparral filed a *Cross Motion for Summary Judgment* seeking judgment as a matter of law based, in part, on OSH Act preemption. On November 19, 1996, the state trial court issued an order overruling the State of Texas' *Motion for Partial Summary Judgment* and granting Chaparral's *Motion for Summary Judgment*. App. C, *infra*, 10a-11a.

The State of Texas appealed the lower court's judgment to the Tenth Court of Appeals for the State of Texas. On July 9, 1997, the state appellate court overruled the summary judgment, rejected Chaparral's argument that Texas law is preempted by the OSH Act, and remanded to the lower court for further proceedings. App. B, *infra*, 3a-9a. The state appellate court's rejection of Chaparral's OSH Act preemption defense rests on two premises: (1) that, despite OSHA's express findings and the OSHRC's final order, the specific federal safety standard cited by OSHA did not actually apply to Chaparral, and (2) that, because no specific OSHA standard applied to Chaparral, and because no federal safety regulation specifically regulates railway clearances, the Texas Railroad Clearance Act is not preempted because it does not "actually conflict" with the OSH Act. App. B, *infra*, 7a-9a.

With respect to its first premise, the state court acknowledged that OSHA had applied 29 C.F.R. 1910.145(c)(3) —the federal warning sign standard—as the basis for one of its citations. But, based on its own reading of the federal regulation, the court rejected OSHA's interpretation and its application of the standard to Chaparral's workplace. The court first held that 29 C.F.R. § 1910.145 (c)(3) did not apply to Chaparral because "its aim is to standardize color and design for safety signs." The court then disagreed with OSHA's conclusion that the regulation actually applied to Chaparral at all. App. B, *infra*, 9a. Because it did not agree with OSHA's interpretation that the specific federal standard applied to Chaparral, and because it believed that the general duty clause itself did

not support preemption, the appellate court concluded that the Texas Railroad Clearance Act was not preempted.

The court also declined to apply *Gade v. National Solid Wastes Management Ass'n, supra,* which it distinguished as dealing "with a very specific area . . . which had already been regulated by federal law." Instead, it applied a general standard developed outside the context of the OSH Act, holding that "[p]reemption . . . occurs only to the extent that a state law interferes with or is contrary to a federal law, and even then the state statute is void only to the extent that it conflicts with federal law." App. B, *infra,* 8a, *citing Florida Lime & Avocado Growers, Inc. v. Paul,* 373 U.S. 132, 142-144 (1963). On this basis, and without discussing *Gade* or its ruling that the OSH Act broadly preempts all state statutes "relating to" issues regulated by federal standards, the court held that the Texas clearance law was not preempted because it did not "actually conflict" with OSHA regulations.

The Texas Court of Appeals denied Chaparral's *Motion for Reconsideration* on September 3, 1997. App. B, *infra,* 2a. Chaparral then filed a *Petition for Review* by the Supreme Court of Texas, which was denied on February 13, 1998. App. A, *infra,* 1a.

## REASONS FOR GRANTING THE WRIT

### I. REVIEW BY THIS COURT WOULD ELIMINATE CONFUSION REGARDING THE MAJORITY OPINION ANNOUNCED IN *GADE v. NATIONAL SOLID WASTES MANAGEMENT ASSOCIATION.*

Over the past five years, *Gade v. Nat'l Solid Wastes Mgmt. Ass'n, supra,* has become a significant Supreme Court precedent often cited in federal courts' preemption analysis. Still the seminal authority on OSH Act preemption, the opinion has been applied to gauge state-law preemption under diverse federal statutes such as the Federal Aviation Act, the Federal Hazardous Substances Act, and

the Clean Air Act.[4] But, despite the proliferation of courts relying on *Gade* for guidance, other courts continue to focus on the fact that *Gade* is, in part, a plurality opinion. For example, in *Myrick v. Freuhauf Corp.*, 13 F.3d 1516, 1523 (CA11 1994), *aff'd sub nom. Freightliner Corp. v. Myrick*, 514 U.S. 280 (1995), the Eleventh Circuit acknowledged that "the main thrust of the Gade decision was that state laws with purposes different from a federal law may still be pre-empted." The court noted, however, that the particular "implied preemption theory" followed by Justice O'Connor and three other justices was not adopted by Justice Kennedy, who applied an "express preemption" analysis. *Id.* The distinction between pluarity and majority portions of *Gade* has led to substantial confusion, especially among state courts.

While courts such as the Eleventh Circuit can differentiate between the plurality and majority portions of *Gade*, other courts—such as the Texas Court of Appeals—obviously can not. In fact, as shown by the opinion below, state courts have been unwilling or unable to apply the preemption analysis adopted by five justices in *Gade*. Their confusion arises from the fact that *one issue* in the entire opinion was determined by a plurality: whether the OSH Act's prohibition against supplemental state-law regu-

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[4] *See, e.g., Nat'l Helicopter Corp. of America v. City of New York*, 952 F. Supp. 1011, 1022-23 (S.D.N.Y. 1997), *modified on other grounds*, 137 F.3d 81 (CA2 1998) (effect of city ordinance on Federal Aviation Act, Airport Noise and Capacity Act, Noise Control Act, and Airport and Airway Improvement Act); *Blue Circle Cement, Inc. v. Board of County Comm'rs*, 917 F. Supp. 1514, 1515 (N.D. Okla. 1995) (preemption of state law by federal Resource Conservation and Recovery Act); *Chiglo v. City of Preston*, 909 F. Supp. 675, 677 (D. Minn. 1995) (effect of state law on federal Cigarette Labeling and Advertising Act); *Toy Mfrs. of America, Inc. v. Blumenthal*, 806 F. Supp. 336, *aff'd*, 986 F.2d 615 (CA2 1992) (preemption of Connecticut Child Protection Act by Federal Hazardous Substances Act); *Gutierrez v. Mobil Oil Corp.*, 798 F. Supp. 1280, 1281 (W.D. Tex. 1992) (preemption by federal Clean Air Act).

lation operates via "implied" or "express" preemption. This issue has absolutely no effect on the *scope* of OSH Act preemption, which was agreed upon by a five-justice majority. It nonetheless has led to unnecessary confusion over the Court's true holding in *Gade* and provided a convenient avenue for state courts to avoid *Gade* altogether.[5]

Federal courts will have few opportunities to correct state courts' misapplication of *Gade*. States usually will bring enforcement actions in their own courts; judicial review of these enforcement actions, including the review of any *federal* preemption defense, will take place almost exclusively within *state* appellate systems. This case presents an opportunity for the Court to clarify the majority's position in *Gade* and to eliminate confusion regarding, or failure to respect, its holding.

## II. THE TEXAS TENTH COURT OF APPEALS' OPINION CONFLICTS WITH THIS COURT'S MAJORITY ANALYSIS IN *GADE*.

### A. By Holding That State Laws Are Preempted Only if They "Actually Conflict" With the OSH Act, the Texas Court Rejected the Standard Adopted by the *Gade* Majority in Favor of a Standard Preferred by the *Gade* Dissent.

The Texas Court of Appeals refused to apply this Court's controlling opinion in *Gade v. Nat'l Solid Wastes Mgmt. Ass'n, supra,* which it qualified as "a five-to-four

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[5] *See, e.g., Kerker v. Elbert*, 261 Ill.App.3d 924, 930, 634 N.E.2d 482, 486 (Ill.App. 1994) (citing *Gade*'s status as a five-to-four decision to apply a "presumption against preemption . . . which four members of the United States Supreme Court deemed sufficient to defeat preemption in *Gade*"); *Fragassi v. Neiburger*, 269 Ill.App.3d 633, 636-37, 646 N.E.2d 315, 317 (Ill.App. 1995) (concluding that the OSH Act preempts state laws that "conflict" with, rather than "relate to", a federal standard). One *federal* court even went so far as to hold that the entire *Gade* opinion was "nothing more than dicta." *Industrial Truck Ass'n, Inc. v. Henry*, 909 F. Supp. 1368, 1376 (S.D. Cal. 1995), *rev'd*, 125 F.3d 1305 (CA9 1997).

decision with one of the majority justices filing a separate [concurring] opinion." App. B, *infa,* 7a-8a. Observing that *Gade* involved an "extensive, thoroughly developed" state plan imposing "an additional set of standards" and resulting in an "overlapping of authority in the specific area," the court concluded that *Gade* did not apply to the Railroad Clearance Act because there is no "parallel federal regulation" governing railroad clearances. The court instead followed a completely different line of authority holding that state law is preempted only to the extent that it "actually conflicts" with federal law. App. B, *infra,* 8a.

By refusing to apply the standard articulated in *Gade,* the Texas court actually adopted an analysis favored by Justice Souter and the *Gade* dissent. The dissenting justices reasoned that "[a]s long as compliance with federally promulgated standards does not render obedience to [state] regulations impossible, the enforcement of the state law is not prohibited by the Supremacy Clause." *Gade, supra,* 505 U.S. at 121-22 (Souter, J., dissent).

Had the Texas court properly applied *Gade* it would have recognized that the *majority* did not require an "actual conflict" between state regulation and standards adopted under the OSH Act. In fact, Justice Souter opened his dissent by recognizing that the majority had *rejected* the "actual conflict" standard:

> The Court holds today that § 18 of the Occupational Safety and Health Act of 1970, 29 U.S.C. § 667, preempts state regulation of any occupational safety or health issue as to which there is a federal standard, *whether or not the state regulation conflicts with the federal standard in the sense that enforcement of one would preclude application of the other.*

*Gade, supra,* 505 U.S. at 114-15 (Souter, J., dissent) (emphasis added). This language accurately reflects the majority position explained by Justice O'Connor:

> [W]e conclude that [the OSH Act's] preservation of state authority in the absence of a federal standard

> presupposes a background pre-emption of all state occupational safety and health standards whenever a federal standard governing the same issue is in effect.

*Gade, supra,* 505 U.S. at 100; *accord Industrial Truck Ass'n, Inc. v. Henry,* 125 F.3d 1305, 1310 (CA9 1997) ("[the *Gade*] opinion, by its very nature, establishes that the preemption worked by federal OSHA standards goes beyond conflict preemption.") Accordingly, the Texas Court of Appeals' application of an "actual conflict" standard conflicts directly with this Court's majority opinion in *Gade.*

**B. The Texas Court Also Rejected This Court's Majority Holding in *Gade* by Ruling That Texas' "Dual Impact" Railroad Clearance Law Is Not Preempted by the OSH Act.**

Though not clearly stated in its opinion, the Texas court also suggested that OSH Act preemption could not apply because the Texas Railroad Clearance Act is a general state statute with only an incidental effect on federal workplace regulations. According to the court, "if Chaparral had complied with the Act, the hazardous condition would not have existed to trigger" the OSHA citations. App. B, *infra,* 8a. This analysis also conflicts with the Court's opinion in *Gade,* which explains that state laws need not specifically address workplace safety to infringe on the comprehensive scheme adopted by Congress.

After rejecting the "actual conflict" standard favored by the dissent, the *Gade* majority explained that OSH Act preemption extends to *any* state standard relating to an occupational safety or health issue with respect to which a federal standard has been promulgated. *Gade, supra,* 505 U.S. at 104-05, 111. The Court explained that in "assessing the impact of a state law on the federal scheme, we have refused to rely solely on the [state] legislature's professed purpose and have looked as well to the effects of the law." *Id.* at 105. It concluded:

> That such a law may also have a nonoccupational impact does not render it any less of an occupational standard for purposes of pre-emption analysis. If the State wishes to enact a dual impact law that regulates an occupational safety or health issue for which a federal standard is in effect, [the OSH Act] requires that the State submit a plan for the approval of the Secretary.

*Id.*, 505 U.S. at 107-08; *accord Industrial Truck Ass'n, Inc. v. Henry, supra,* 125 F.3d at 1310 ("All state regulations relating to the "issue" of a federal standard are preempted even if they do not conflict with the federal scheme."). Accordingly, the Texas court's implicit holding—that the Railroad Clearance Act is not preempted merely because it is a general public safety statute—conflicts with this Court's majority opinion in *Gade*.

### C. The Texas Court's Failure To Follow Standards Set by This Court Will Have a Substantial Impact on Issues Already Regulated by Federal Occupational Safety and Health Standards.

OSHA determined that the hazard it found at Chaparral's workplace could be avoided by implementing an appropriate work rule, providing training, and placing adequate signage in the dangerous area. In contrast, in addition to imposing up to twenty million dollars in additional penalties, the State of Texas would require Chaparral to move or rebuild its long-standing structures to ensure compliance with the Texas Railroad Clearance Act. The Railroad Commission has no alternative but to apply these blunt and wasteful measures because it does not possess the tools, authority or background necessary to fashion an *appropriate* workplace remedy. OSHA, on the other hand, is charged with assessing both the efficacy and the economic feasibility of its standards; it possesses both the expertise and the authority to implement *appropriate* remedies to achieve its goal of workplace safety. *See, e.g., Color Pigment Mfrs. Ass'n, Inc. v. OSHA,* 16 F.3d 1157,

1161 (CA11 1994). The State of Texas' heavy-handed attempt to apply a law drafted for other purposes—one that it has not enforced in over seventy years—is an obvious attempt to apply precisely the type of supplemental state regulation rejected by Congress and this Court alike. Application of the Texas Railroad Clearance Act to Chaparral's workplace will have a substantial impact on issues already regulated by federal occupational health and safety standards and should, under a correct legal analysis, be preempted.

## III. THE TEXAS COURT OF APPEALS ALSO UNLAWFULLY REJECTED BOTH THE OCCUPATIONAL SAFETY AND HEALTH ADMINISTRATION'S AND THE OCCUPATIONAL SAFETY AND HEALTH REVIEW COMMISSION'S BINDING INTERPRETATION OF 29 C.F.R. § 1910.145(c)(3).

OSHA's documentation is clear: on March 4, 1992, it cited Chaparral for a "serious" violation of 29 C.F.R. § 1910.145(c)(3) and assessed a $5,000 penalty for failure "to instruct employees of hazard of being caught between moving box cars and the retaining wall." *See* OSHA Citation, App. G, *infra*, 30a-31a. That citation, and the standard set by 29 C.F.R. § 1910.145(c)(3), were then incorporated in the Occupational Safety and Health Review Commission's order approving the citation, penalty and corrective action. App. H, *infra*, 33a-37a.

In its opinion, the Texas appellate court refused to accept OSHA's determination that 29 C.F.R. § 1910.145 (c)(3) applied to conditions at Chaparral's facility. Though acknowledging that OSHA had specified the regulation in its citation, the state court unilaterally decided that the standard did not apply because—according to the court—its "aim" is to "standardize color and design for safety signs." The court also drew its own conclusion that the "scope" of the regulation did not cover hazardous situations at Chaparral's workplace. The state court over-

ruled both OSHA and the OSHRC and held that 29 C.F.R. § 1910.145(c)(3) did not apply to Chaparral. App. B, *infra*, 9a.

The Texas Court of Appeals had no authority to overturn OSHA's conclusion that 29 C.F.R. § 1910.145(c)(3) regulated the condition later cited by the Texas Railroad Commission. OSHA is the federal agency that promulgated 29 C.F.R. § 1910.145(c)(3) and, according to this Court, the entity charged by Congress with interpreting both the OSH Act and OSHA's own regulations. Unless clearly unreasonable, its interpretations of the Act and of OSHA regulations are conclusive. *Martin v. Occupational Safety and Health Review Comm'n*, 499 U.S. 144 (1991). Moreover, once OSHA's interpretation was approved by the federal Occuational Safety and Health Review Commission and entered as an OSHRC order, the Texas Court of Appeals had absolutely no jurisdiction to set the order aside or to reverse its findings. Review of OSHRC orders is limited exclusively to the federal Courts of Appeals and, ultimately, to this Court. *Id.* at 148; 29 U.S.C. § 660(a). Accordingly, the Texas court's rejection of OSHA and OSHRC findings violates both the OSH Act and the federal Supremacy Clause: U.S. Constitution, Art. VI, cl. 2.[6]

The Texas Court of Appeals unlawfully set aside a conclusive determination by OSHA and the OSHRC that any hazard created by inadequate clearance between

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[6] The plain language of 29 C.F.R. § 1910.145(c)(3) also suggests that the Texas court's interpretation was incorrect as well as inappropriate. The state court concluded that the regulation was intended merely "to standardize color and design for safety signs." But the language of this provision contains a clear standard: "Safety instructions *shall be used* where there is a need for general instructions and suggestions relative to safety measures." App. F, *infra*, 24a (emphasis added). Thus, even if the Texas court *had* jurisdiction to reverse findings by OSHA and the OSHRC, it would still be bound by OSHA's reasonable interpretation of 29 C.F.R. § 1910.145(c)(3).

Chaparral's retaining wall and its rail tracks was regulated by 29 C.F.R. § 1910.145(c)(3). For this reason, and for the reasons discussed in Section II, *supra*, the Texas Railroad Clearance Act "relates to" an issue regulated by a specific federal occupational standard and is preempted by the OSH Act, 29 U.S.C. § 667.

## IV. THIS CASE INVOLVES AN IMPORTANT ISSUE AFFECTING MORE THAN SIX MILLION WORKPLACES REGULATED UNDER THE OSH ACT. IT WILL HAVE A WIDESPREAD EFFECT ON EMPLOYERS' INCENTIVE TO COOPERATE WITH, PARTICIPATE IN AND REACH SETTLEMENTS AFTER FEDERAL OSHA INVESTIGATIONS.

This case is not unique. In 1997, the Federal Occupational Safety and Health Administration monitored more than one hundred million workers at over six million workplaces throughout the United States.[7] During the 1997 fiscal year, OSHA conducted over thirty-four thousand workplace inspections, cited over eighty-three thousand violations, and assessed almost ninety million dollars in penalties. Over thirty-six hundred inspections took place in Texas alone. *Id.*

Allowing the State of Texas to regulate workplace issues already subjected to OSHA standards and to assess a twenty-million dollar penalty—*nearly one quarter of all penalties assessed by OSHA in 1997*—would utterly destroy the balance struck by Congress when it enacted the OSH Act in 1970. Worse, allowing the State of Texas to collect a twenty-million-dollar windfall under a statute *it had not enforced since 1925* would provide a powerful incentive for Texas and any other state to comb its statutes for *any* law, however stale, for use after any OSHA citation. Finally, due to the enormous size of the

---

[7] *See OSHA Facts: Common Sense at Work, published at* http://www.osha.gov/oshinfo.

penalty and Texas' refusal to recognize OSH Act preemption, allowing the State of Texas to regulate issues *already subjected to OSHA standards* will completely change employers' incentive to cooperate with, participate in and reach settlements after federal OSHA investigations. If federal courts fail to intercede in this—an extreme intrusion upon the OSH Act balance—employers will have no assurance that states cannot simply sidestep "Congress' intent to avoid subjecting workers and employers to duplicative regulation." *Gade v. Nat'l Solid Wastes Mgmt. Ass'n, supra,* 505 U.S. 88, 98 (1992).

## CONCLUSION

For all the reasons set forth above, petitioner Chaparral Steel Company respectfully requests that its *Petition for Writ of Certiorari* be granted.

Respectfully submitted,

STEVEN R. MCCOWN
*Counsel of Record*
WARREN M. DAVISON
ALLAN G. KING
RICHARD C. RYBICKI
LITTLER MENDELSON P.C.
300 Crescent Court, Suite 600
Dallas, Texas 75201
(214) 922-4500
*Counsel for Petitioner*

Date: May 14, 1998

# APPENDICES

## APPENDIX A

[SEAL]

THE SUPREME COURT OF TEXAS
Post Office Box 12248
Austin, Texas 78711

(512) 463-1312

February 13, 1998

Ms. Julie Staples Brunett
Littler Mendelson
300 Crescent Court, Suite 600
Dallas, TX 75201

Ms. Jeffee L. Martinez-Vargas
Office of the Attorney General of Texas
Dan Morales, A. G.
P. O. Box 12548
Austin, TX 78711

RE: Case Number 97-0964

CHAPARRAL STEEL COMPANY

v.

STATE OF TEXAS

Dear Counsel:

Today, the Supreme Court of Texas denied the petition for review in the above styled case.

Sincerely,

JOHN T. ADAMS,
Clerk

by: /s/ Michael H. Kopp
MICHAEL H. KOPP,
Deputy

cc: Ms. Imogene Allen, Clerk
Mr. Billie Fuller

**APPENDIX B**

TENTH COURT OF APPEALS
P. O. Box 1606
Waco, Texas 76703-1606
Phone (254) 757-5200

September 3, 1997

Douglas B. Fraser
Assistant Attorney General
P. O. Box 12548
Austin, TX 78711-2548

Steven R. McCown
Littler Mendelson
300 Crescent Court, Suite 600
Dallas, TX 75201

RE: Court of Appeals Number: 10-97-00013-CV
Trial Court Case Number: 50334

THE STATE OF TEXAS

v.

CHAPARRAL STEEL COMPANY

Dear Counsel:

Appellant(s) motion to publish opinion was denied today.

Chaparral Steel Company's motion for rehearing was denied today.

Sincerely,

IMOGENE ALLEN,
Clerk

By: /s/ Lillian Kissinger
LILLIAN KISSINGER,
Deputy

[SEAL]

IN THE TENTH COURT OF APPEALS

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No. 10-97-013-CV

THE STATE OF TEXAS,
*Appellant,*

v.

CHAPARRAL STEEL COMPANY,
*Appellee.*

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From the 40th District Court
Ellis County, Texas
Trial Court # 50334

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OPINION

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We must decide whether the Railroad Clearance Act (the Act) applies to tracks owned by a non-railroad company, and if so, whether the applicable provisions of the Act have been preempted by the Federal Occupational Safety and Health Act. Because we find that the Act applies and has not been preempted, we will reverse the summary judgment and remand the cause for a determination of the amount of penalties due to the State.

FACTS

The Attorney General, at the request of the Texas Railroad Commission (the State), sued Chaparral Steel Com-

pany (Chaparral) for civil penalties after a company employee was crushed to death between a train and a retaining wall at the company's plant site. The State charged violation of the Texas Railroad Clearance Act (the Act). TEX. REV. CIV. STAT. ANN. art. 6559a (Vernon 1925). Chaparral denied that the Act applied, because it is a private corporation engaged in manufacturing and recycling steel. All materials going in and out of the steel plant are moved by rail, including raw materials, scrap, and finished products. Chaparral owns and maintains its own private system of railroad tracks, switches, spurs, and rail cars (all on its plant site) to conduct its steel business.

After the fatal accident, the Occupational Safety and Health Administration (OSHA) cited Chaparral for a safety hazard for maintaining a dangerous situation created by having inadequate clearance around the rail tracks. To settle this citation, Chaparral paid a $5,000 penalty and agreed to: (1) implement an "absolute work rule" prohibiting employees from working in that area when boxcars were present; (2) conduct safety training concerning the hazards; and (3) install warning signs identifying the danger and telling employees to avoid the area when the track had cars on it. Because of this action, Chaparral claims federal law has preempted the State in regulating this particular safety hazard and therefore the Act does not apply.

Both the State and Chaparral moved for summary judgment. Chaparral's motion was based on two separate grounds, and the trial court granted it without specifying on which ground (or both) it was granted. The State thus attacks both grounds on appeal. We will consider them in the order of the State's contentions, first that the Texas Railroad Clearance Act of 1925 applies even though Chaparral is not a "railroad," and second that the federal government, via OSHA regulations, has not preempted state authority in this area. The record on appeal is complete because findings of fact and conclusions of law have

no place in a summary judgment proceeding. *Linwood v. NCNB*, 885 S.W.2d 102, 103 (Tex. 1994).

## STATUTE

The Act was passed in 1925. In summary, section 1 requires 22 feet of vertical clearance from the top of the rails; section 2 requires 8½ feet of clearance from the center of the rail line; section 3 applies these clearances to projections as well as structures, with section 3a "grandfathering" certain existing or under-construction nonconforming structures; section 4 authorizes penalties; section 5 allows the Railroad Commission to grant deviation permits to certain cases; and section 6 contains procedural enactment details.

The plain and common meaning of the words as used is the standard with which this Court must review statutory language. *Moreno v. Sterling Drug, Inc.*, 787 S.W.2d 348, 352 (Tex. 1990). Furthermore, statutory construction should evaluate the entire document rather than focus on separate sections. *Durish v. Channelview Bank*, 908 S.W.2d 273, 275 (Tex. App.—Austin 1991, writ denied). When a court is interpreting the language in a statute, the words and terms the legislature used must be considered in their plain and common meanings. *Monsanto Co. v. Cornerstones Mun. Util. Dist.*, 865 S.W.2d 937, 939 (Tex. 1993).

Chaparral's particular challenge to coverage focuses on comparing the wording found in Sections 1 and 2 regarding *who* is doing the building. Section 1 refers to a long list of constructed items "built over the tracks of a railway, or over the tracks of railroads, *by the State, or by a county, municipality, a railroad company or other corporation, firm, partnership, or natural person. . . .*" TEX. REV. CIV. STAT. ANN. art. 6559a (Vernon 1925) (emphasis added). Chaparral does not contest that section 1 of the Raiload Clearance Act applies to it; rather it argues that because the language in section 2 does not follow the

identical language in section 1, the Legislature must have intended that a different group of entities be covered.

Section 2 reads:

> All loading platforms and all houses and structures, and all fences, and all lumber, wood and other materials hereafter built, placed or stored *along the railroads of this State*, either on or near the right of way of the main lines, or on or near any spur, switch or siding of any such railroad shall be so built, constructed, or placed that there shall be not less than eight and one-half (8½) feet space from the center of such main line, spur, switch, or siding to the nearest edge of the platform, or to the wall of the building, or to the lumber, wood, or other material.

*Id.*, art. 6559b (Vernon 1925) (emphasis added). Because the retaining wall is the type of structure covered under section 2 of the statute, Chaparral argues that this is the controlling section, and that for the Act to apply at all, the company would have to be a "railroad of this state" as the phrase is used in section 2.

It then argues that it is not "a railroad of this state" because that phrase in this context means a common carrier. We disagree. We find no authority for such a narrow definition of "railroad." Early cases decided before the enactment of the Railroad Clearance Act held precisely the opposite. *E.g., Kirby Lumber Co. Receivers v. Owens*, 120 S.W. 936 (Tex. Civ. App. 1909) and *Consolidated Kansas City Smelting & Ref. Co. v. Schulte*, 176 S.W. 94 (Tex. Civ. App.—El Paso 1915, writ ref'd). We agree with the State that the plain meaning of this phrase refers to the physical location of the rails, *i.e.*, they are in Texas. "Railroad of this state" refers to physical facilities, not to ownership. Section 1 plainly includes Chaparral as an entity which must provide proper clearances for tracks located within the State of Texas, with section 1 describing the types of obstructions in vertical relation to the

track and section 2 describing them in horizontal relation to the track.

We believe the plain meaning of the statute is that all railroad tracks in the State must be kept free of obstructions. The legislature in 1925 decided that the standard open area around the tracks would be 8½ feet horizontally from the center of the track and 22 feet vertically from the top of the rails. The plain meaning allows for no other interpretation. The State's first point of error is sustained.

FEDERAL PREEMPTION

The State's second point of error attacks the defense that the federal government has preempted regulations in this area by the Occupational Safety and Health Act. 29 U.S.C.A. § 651 (1970). The Supremacy Clause of the United States Constitution, U.S. Const. art. VI, cl. 2, establishes the principle that when state and federal law conflict, federal law will prevail unless the regulated area is clearly within a state's reserved power. *Felder v. Casey*, 487 U.S. 131, 138, 108 S. Ct. 2302, 2307, 101 L.Ed. 2d 123, 130 (1988). A court interpreting a federal statute pertaining to an area of state authority should assume that the historic police powers of the States are not superseded by the federal act unless that was the clear and manifest purpose of Congress. *Rice v. Santa Fe Elevator Corp.*, 331 U.S. 218, 230, 67 S. Ct. 1146, 1152, 91 L.Ed. 1447, 1452 (1947). Chaparral claims that the citation it received from OSHA inspectors for a retaining wall having been built too close to its tracks shows that Congress has preempted this State regulation. This citation, however, was issued under the "general duty to maintain a safe workplace" provision of the OSHA act, and there is no other federal provision cited which governs clearances around railroad tracks.

Chaparral relies on a recent decision by the United States Supreme Court, *Gade v. National Solid Waste Mgmt. Ass'n.*, 505 U.S. 88, 112 S.Ct. 1274, 120 L.Ed.2d

73 (1992), as authority for the proposition that federal law should be held to have preempted the Texas Act. *Gade* is a five-to-four decision with one of the majority justices filing a separate opinion concurring in part of the opinion. It recognizes that preemption may be either explicitly or implicitly contained in a statute's structure. *Id.*, 505 U.S. at 98, 112 S.Ct. at 1283. This case dealt with a very specific area—the training, testing, and licensing of hazardous waste disposal employees—which had already been regulated by federal law. Furthermore, the state plan was extensive, thoroughly developed, and subjected employers and employees to an additional set of standards. This overlapping of authority in the specific area is very different than the issue now before this court with the Texas Act. There is no parallel federal regulation specifying railroad clearances. The OSHA "general duty" clause is just that: a very broad, nonspecific statement that employers in general have an obligation to provide a safe environment for their employees. It has been specifically recognized that the general duty clause does not conflict with state standards. *Puffer's Hardware, Inc. v. Donavan*, 742 F.2d 12, 16 (1st Cir. 1984). Indeed, it would not make sense for the general duty clause to supersede all specific standards enacted by state authorities to encourage the kind of workplace that OSHA regulations were attempting to ensure.

Preemption, furthermore, occurs only to the extent that a state law interferes with or is contrary to a federal law, and even then the state statute is void only to the extent that it actually conflicts with the federal law. *See Florida Lime & Avocado Growers, Inc. v. Paul*, 373 U.S. 132, 142-144, 83 S.Ct. 1210, 1217-19, 10 L.Ed.2d 248, 254-55 (1963). Applying this principle to Chaparral, if Chaparral had complied with the Act, the hazardous condition would not have existed to trigger a citation for violating the general duty an employer has to maintain a safe working environment.

Chaparral also argues that Section 1910.145(c)(3), C.F.R., regulates the hazardous track situation to the exclusion of the Texas Act because that section was also referred to in the citation. Entitled "specifications for accident prevention signs and tags," its aim is to standardize color and design for safety signs. In addition, the next to last sentence of subsection (a) *Scope* reads:

> These specifications are intended to cover all safety signs except those designed for streets, highways, railroads, and marine regulations.

We hold that neither this section concerning signs for hazardous situations nor the general duty clause of the OSHA act preempts the Texas Act. The State's second point of error, that the trial court erred in granting summary judgment on the basis that the clearance law is preempted by the OSHA act, is sustained.

At oral argument, the parties agreed that in the event of a reversal the cause should be remanded for a determination of the amount of penalties to which the State may be entitled under the Act. Accordingly, we remand the cause to the trial court for further proceedings consistent with this opinion.

BILL VANCE
Justice

Before Chief Justice Davis,
Justice Cummings, and
Justice Vance

Reversed and remanded
Opinion delivered and filed July 9, 1997
Do not publish

APPENDIX C

[Filed Nov. 19, 1996]

IN THE DISTRICT COURT
OF ELLIS COUNTY, TEXAS
40TH JUDICIAL DISTRICT

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Cause No. 50,334

STATE OF TEXAS

vs.

CHAPARRAL STEEL COMPANY

---

ORDER ON MOTIONS FOR SUMMARY JUDGMENT

On December 12, 1995, the Court heard the Motions for Summary Judgment filed in this cause by Plaintiff, STATE OF TEXAS, and the Motion for Summary Judgment of Defendant, CHAPARRAL STEEL COMPANY.

All parties appeared by and through their respective counsel.

The Court, after examining the pleadings and summary judgment evidence, and hearing the arguments of counsel, determines that the defendant is entitled to summary judgment and plaintiff is not entitled to summary judgment.

The Court overrules the Plaintiff's Motion for Summary Judgment.

The Court grants the Defendant's Motion for Summary Judgment.

The Plaintiff's Motion for Summary Judgment and all relief requested is hereby DENIED.

The Defendant's Motion for Summary Judgment is GRANTED.

SIGNED this 19th day of November, 1996.

[Illegible]
Presiding Judge

**APPENDIX D**

# GENERAL LAWS

OF

# THE STATE OF TEXAS

PASSED BY

## THIRTY-NINTH LEGISLATURE

AT ITS

## REGULAR SESSION

WHICH

CONVENED JANUARY 13, 1925, AND
ADJOURNED MARCH 19, 1925

[SEAL]

MRS. EMMA GRIGSBY MEHARG,
Secretary of State

* * * *

Art. 6559. May enforce contracts

All such cities are hereby given the right and power to compel the construction and completion of such viaducts as railway companies have by contract agreed with any such city to construct and complete or which any railway company or companies may hereafter agree to construct and complete, by mandamus proceedings in the district court of the county where such viaduct or viaducts are to be completed or through any other lawful means. [Id.]

[Art. 6559a. Height of bridges or viaducts]

All bridges, viaducts, overheadways, foot bridges, wires or other structures hereafter built over the tracks of a railway, or over the tracks of railroads, by the State, or by a county, municipality, a railroad company or other corporation, firm, partnership, or natural person, shall be placed not less than twenty-two (22) feet in the clear from the top of the rails of such track or tracks to such structure or wire, or to the bottom of the lowest sill, girder or cross-beam, the lowest downward projection on the bridge, viaduct, overheadway, or foot bridge or other structure. [Inserted by compiler from Acts 1925, 39th Leg., ch. 11, p. 32, § 1.]

[Art. 6559b. Structures near tracks]

All loading platforms and all houses and structures, and all fences, and all lumber, wood and other materials hereafter built, placed or stored along the railroads of this State, either on or near the right of way of the main lines, or on or near any spur, switch or siding of any such railroad, shall be so built, constructed, or placed that there shall be not less than eight and one-half (8½) feet space from the center of such main line, spur, switch or siding to the nearest edge of the platform, or to the wall of the building, or to the lumber, wood, or other material. [Inserted by compiler from Acts 1925, 39th Leg., ch. 11, p. 32, § 2.]

[Art. 6559c. Roof projections over tracks]

All roof projections hereafter constructed from any loading platform along any railroad main track, or spur, switch, or siding track shall be not less than twenty-two (22) feet above the rails of such track, and the other edge of said roof projection shall be not less than eight and one-half (8½) feet horizontally from the center of said track. [Inserted by compiler from Acts 1825, 39th Leg., ch. 11, p. 32, § 3.]

[Art. 6559d. Not applicable when]

The provisions of this Act shall not apply to nor prevent the building, placing, constructing or completing of structures or other things enumerated in Sections One, Two and Three, when same are being built, placed, or are in the courses of construction at the time this Act takes effect, or if material has been purchased for such placing, building, or construction at the time this Act takes effect, pursuant to prior contracts or plans. [Inserted by compiler from Acts 1925, 39th Leg., ch. 11, p. 33, § 3a.]

[Art. 6559e. Penalty recoverable by Attorney General]

If any railway company or other corporation, firm, partnership, or person shall hereafter erect any structure or wire in violation of any provision of this Act, or shall hereafter in any manner violate any provision of this Act, it shall be the duty of the Attorney General immediately to file a suit in court of competent jurisdiction, to collect a penalty, which is hereby prescribed of not less than one hundred ($100.00) dollars nor more than one thousand ($1,000.00) dollars for each violation of this Act; and the Attorney General may, in his discretion, sue in one proceeding for all violations of this Act by any one railway company or other corporation, firm, partnership or person. Provided further, that the said penalty shall accrue for each day such structure, wire, lumber, wood or other material is permitted to remain in violation of this Act, and each day same is permitted to remain, constitutes

a separate violation of this Act. [Inserted by compiler from Acts 1925, 39th Leg., ch. 11, p. 33, § 4.]

[Art. 6559f. Regulation by Commission]

It is hereby made the duty of the Railroad Commission to promulgate rules and regulations in accordance with this Act. It is further provided that upon application regularly made and filed, and after notice to the Attorney General, the Railroad Commission may, for good cause shown, permit any railway company or other corporation, firm, partnership, or person, or any county or municipality to deviate from the terms of this Act in accordance with an order of the Commission made and entered; and in such event the corporation, firm, partnership, or person acting in accordance with the order of the Railroad Commission so made shall not be deemed to have violated this Act. [Inserted by compiler from Acts 1925, 39th Leg., ch. 11, p. 33, § 5.]

## APPENDIX E

# UNITED STATES CODE ANNOTATED
# TITLE 29. LABOR
# CHAPTER 15—OCCUPATIONAL SAFETY AND HEALTH

§ 651. Congressional statement of findings and declaration of purpose and policy

(a) The Congress finds that personal injuries and illnesses arising out of work situations impose a substantial burden upon, and are a hindrance to, interstate commerce in terms of lost production, wage loss, medical expenses, and disability compensation payments.

(b) The Congress declares it to be its purpose and policy, through the exercise of its powers to regulate commerce among the several States and with foreign nations and to provide for the general welfare, to assure so far as possible every working man and woman in the Nation safe and healthful working conditions and to preserve our human resources—

(1) by encouraging employers and employees in their efforts to reduce the number of occupational safety and health hazards at their places of employment, and to stimulate employers and employees to institute new and to perfect existing programs for providing safe and healthful working conditions;

(2) by providing that employers and employees have separate but dependent responsibilities and rights with respect to achieving safe and healthful working conditions;

(3) by authorizing the Secretary of Labor to set mandatory occupational safety and health standards applicable to businesses affecting interstate commerce, and by creating an Occupational Safety and Health Review Commission for carrying out adjudicatory functions under this chapter;

(4) by building upon advances already made through employer and employee initiative for providing safe and healthful working conditions;

(5) by providing for research in the field of occupational safety and health, including the psychological factors involved, and by developing innovative methods, techniques, and approaches for dealing with occupational safety and health problems;

(6) by exploring ways to discover latent diseases, establishing causal connections between diseases and work in environmental conditions, and conducting other research relating to health problems, in recognition of the fact that occupational health standards present problems often different from those involved in occupational safety;

(7) by providing medical criteria which will assure insofar as practicable that no employee will suffer diminished health, functional capacity, or life expectancy as a result of his work experience;

(8) by providing for training programs to increase the number and competence of personnel engaged in the field of occupational safety and health;

(9) by providing for the development and promulgation of occupational safety and health standards;

(10) by providing an effective enforcement program which shall include a prohibition against giving advance notice of any inspection and sanctions for any individual violating this prohibition;

(11) by encouraging the States to assume the fullest responsibility for the administration and enforcement of their occupational safety and health laws by providing grants to the States to assist in identifying their needs and responsibilities in the area of occupational safety and health, to develop plans in accordance with the provisions of this chapter, to improve the administration and enforcement of State occupational safety and health laws, and to

conduct experimental and demonstration projects in connection therewith;

(12) by providing for appropriate reporting procedures with respect to occupational safety and health which procedures will help achieve the objectives of this chapter and accurately describe the nature of the occupational safety and health problem;

(13) by encouraging joint labor-management efforts to reduce injuries and disease arising out of employment.

* * * *

§ 654. Duties of employers and employees

(a) Each employer—

(1) shall furnish to each of his employees employment and a place of employment which are free from recognized hazards that are causing or are likely to cause death or serious physical harm to his employees;

(2) shall comply with occupational safety and health standards promulgated under this chapter.

(b) Each employee shall comply with occupational safety and health standards and all rules, regulations, and orders issued pursuant to this chapter which are applicable to his own actions and conduct.

* * * *

§ 667. State jurisdiction and plans

(a) Assertion of State standards in absence of applicable Federal standards

Nothing in this chapter shall prevent any State agency or court from asserting jurisdiction under State law over any occupational safety or health issue with respect to which no standard is in effect under section 655 of this title.

(b) Submission of State plan for development and enforcement of State standards to preempt applicable Federal standards

Any State which, at any time, desires to assume responsibility for development and enforcement therein of occupational safety and health standards relating to any occupational safety or health issue with respect to which a Federal standard has been promulgated under section 655 of this title shall submit a State plan for the development of such standards and their enforcement.

(c) Conditions for approval of plan

The Secretary shall approve the plan submitted by a State under subsection (b) of this section, or any modification thereof, if such plan in his judgment—

(1) designates a State agency or agencies as the agency or agencies responsible for administering the plan throughout the State,

(2) provides for the development and enforcement of safety and health standards relating to one or more safety or health issues, which standards (and the enforcement of which standards) are or will be at least as effective in providing safe and healthful employment and places of employment as the standards promulgated under section 655 of this title which relate to the same issues, and which standards, when applicable to products which are distributed or used in interstate commerce, are required by compelling local conditions and do not unduly burden interstate commerce,

(3) provides for a right of entry and inspection of all workplaces subject to this chapter which is at least as effective as that provided in section 657 of this title, and includes a prohibition on advance notice of inspections,

(4) contains satisfactory assurances that such agency or agencies have or will have the legal authority and quali-

fied personnel necessary for the enforcement of such standards,

(5) gives satisfactory assurances that such State will devote adequate funds to the administration and enforcement of such standards,

(6) contains satisfactory assurances that such State will, to the extent permitted by its law, establish and maintain an effective and comprehensive occupational safety and health program applicable to all employees of public agencies of the State and its political subdivisions, which program is as effective as the standards contained in an approved plan,

(7) requires employers in the State to make reports to the Secretary in the same manner and to the same extent as if the plan were not in effect, and

(8) provides that the State agency will make such reports to the Secretary in such form and containing such information, as the Secretary shall from time to time require.

(d) Rejection of plan; notice and opportunity for hearing

If the Secretary rejects a plan submitted under subsection (b) of this section, he shall afford the State submitting the plan due notice and opportunity for a hearing before so doing.

(e) Discretion of Secretary to exercise authority over comparable standards subsequent to approval of State plans; duration; retention of jurisdiction by Secretary upon determination of enforcement of plan by State

After the Secretary approves a State plan submitted under subsection (b) of this section, he may, but shall not be required to, exercise his authority under sections 657, 658, 659, 662, and 666 of this title with respect to comparable standards promulgated under section 655 of this

title, for the period specified in the next sentence. The Secretary may exercise the authority referred to above until he determines, on the basis of actual operations under the State plan, that the criteria set forth in subsection (c) of this section are being applied, but he shall not make such determination for at least three years after the plan's approval under subsection (c) of this section. Upon making the determination referred to in the preceding sentence, the provisions of sections 654(a)(2), 657 (except for the purpose of carrying out subsection (f) of this section), 658, 659, 662, and 666 of this title, and standards promulgated under section 655 of this title, shall not apply with respect to any occupational safety or health issues covered under the plan, but the Secretary may retain jurisdiction under the above provisions in any proceeding commenced under section 658 or 659 of this title before the date of determination.

(f) Continuing evaluation by Secretary of State enforcement of approved plan; withdrawal of approval of plan by Secretary; grounds; procedure; conditions for retention of jurisdiction by State

The Secretary shall, on the basis of reports submitted by the State agency and his own inspections make a continuing evaluation of the manner in which each State having a plan approved under this section is carrying out such plan. Whenever the Secretary finds, after affording due notice and opportunity for a hearing, that in the administration of the State plan there is a failure to comply substantially with any provision of the State plan (or any assurance contained therein), he shall notify the State agency of his withdrawal of approval of such plan and upon receipt of such notice such plan shall cease to be in effect, but the State may retain jurisdiction in any case commenced before the withdrawal of the plan in order to enforce standards under the plan whenever the issues involved do not relate to the reasons for the withdrawal of the plan.

(g) Judicial review of Secretary's withdrawal of approval or rejection of plan; jurisdiction; venue; procedure; appropriate relief; finality of judgment

The State may obtain a review of a decision of the Secretary withdrawing approval of or rejecting its plan by the United States court of appeals for the circuit in which the State is located by filing in such court within thirty days following receipt of notice of such decision a petition to modify or set aside in whole or in part the action of the Secretary. A copy of such petition shall forthwith be served upon the Secretary, and thereupon the Secretary shall certify and file in the court the record upon which the decision complained of was issued as provided in section 2112 of Title 28. Unless the court finds that the Secretary's decision in rejecting a proposed State plan or withdrawing his approval of such a plan is not supported by substantial evidence the court shall affirm the Secretary's decision. The judgment of the court shall be subject to review by the Supreme Court of the United States upon certiorari or certification as provided in section 1254 of Title 28.

(h) Temporary enforcement of State standards

The Secretary may enter into an agreement with a State under which the State will be permitted to continue to enforce one or more occupational health and safety standards in effect in such State until final action is taken by the Secretary with respect to a plan submitted by a State under subsection (b) of this section, or two years from December 29, 1970, whichever is earlier.

## APPENDIX F

CODE OF FEDERAL REGULATIONS
TITLE 29—LABOR
SUBTITLE B—REGULATIONS RELATING TO LABOR
CHAPTER XVII—OCCUPATIONAL SAFETY AND HEALTH ADMINISTRATION, DEPARTMENT OF LABOR
PART 1910—OCCUPATIONAL SAFETY AND HEALTH STANDARDS
SUBPART J—GENERAL ENVIRONMENTAL CONTROLS

§ 1910.145 Specifications for accident prevention signs and tags.

(a) Scope.

(1) These specifications apply to the design, application, and use of signs or symbols (as included in paragraphs (c) through (e) of this section) intended to indicate and, insofar as possible, to define specific hazards of a nature such that failure to designate them may lead to accidental injury to workers or the public, or both, or to property damages. These specifications are intended to cover all safety signs except those designed for streets, highways, railroads, and marine regulations. These specifications do not apply to plant bulletin boards or to safety posters.

(2) All new signs and replacements of old signs shall be in accordance with these specifications.

(b) Definitions. As used in this section, the word sign refers to a surface on prepared for the warning of, or safety instructions of, industrial workers or members of the public who may be exposed to hazards. Excluded from this definition, however, are news releases, displays commonly known as safety posters, and bulletins used for employee education.

(c) Classification of signs according to use—

(1) Danger signs.

(i) There shall be no variation in the types of design of signs posted to warn of specific dangers and radiation hazards.

(ii) All employees shall be instructed that danger signs indicate immediate danger and that special precautions are necessary.

(2) Caution signs.

(i) Caution signs shall be used only to warn against potential hazards or to caution against unsafe practices.

(ii) All employees shall be instructed that caution signs indicate a possible hazard against which proper precaution should be taken.

(3) Safety instruction signs. Safety instruction signs shall be used where there is a need for general instructions and suggestions relative to safety measures.

(d) Sign design—

(1) Design features. All signs shall be furnished with rounded or blunt corners and shall be free from sharp edges, burrs, splinters, or other sharp projections. The ends or heads of bolts or other fastening devices shall be located in such a way that they do not constitute a hazard.

(2) Danger signs. The colors red, black, and white shall be those of opaque glossly samples as specified in Table 1 of Fundamental Specification of Safety Colors for CIE Standard Source "C". American National Standard Z53.1-1967, which is incorporated by references as specified in § 1910.6.

(3) [Reserved]

(4) Caution signs. Standard color of the background shall be yellow; and the panel, black with yellow letters. Any letters used against the yellow background shall be black. The colors shall be those of opaque glossy samples as specified in Table 1 of American National Standard Z53.1-1967.

(5) [Reserved]

(6) Safety instruction signs. Standard color of the background shall be white; and the panel, green with white letters. Any letters used against the white background shall be black. The colors shall be those of opaque glossy sampl esas specified in Table 1 of American National Standard, Z53.1-1967.

(7) [Reserved]

(8) [Reserved]

(9) [Reserved]

(10) Slow-moving vehicle emblem. This emblem (see fig. J-7) consists of a fluorescent yellow-orange triangle with a dark red reflective border. The yellow-orange fluorescent triangle is a highly visible color for daylight exposure. The reflective border defines the shape of the fluorescent color in daylight and creates a hollow red triangle in the path of motor vehicle headlights at night. The emblem is intended as a unique identification for, and it shall be used only on, vehicles which by design move slowly (25 m.p.h. or less) on the public roads. The emblem is not a clearance marker for wide machinery nor is it intended to replace required lighting or marking of slow-moving vehicles. Neither the color film pattern and its dimensions nor the backing shall be altered to permit use of advertising or other markings. The material, location, mounting, etc., of the emblem shall be in accordance with the American Society of Agricultural Engineers Emblem for Identifying Slow-Moving Vehicles, ASAE R276,

1967, or ASAE S276.2 (ANSI B114.1-1971), which are incorporated by reference as specified in § 1910.6.

[Image Omitted]

(e) Sign wordings.

(1) [Reserved]

(2) Nature of wording. The wording of any sign should be easily read and concise. The sign should contain sufficient information to be easily understood. The wording should make a position, rather than negative suggestion and should be accurate in fact.

(3) [Reserved]

(4) Biological hazard signs. The biological hazard warning shall be used to signify the actual or potential presence of a biohazard and to identify equipment, containers, rooms, materials, experimental animals, or combinations thereof, which contain, or are contaminated with, viable hazardous agents. For the purpose of this subparagraph the term "biological hazard," or "biohazard," shall include only those infectious agents presenting a risk or potential risk to the well-being of man.

(f) Accident prevention tags—

(1) Scope and application.

(i) This paragraph (f) applies to all accident prevention tags used to identify hazardous conditions and provide a message to employees with respect to hazardous conditions as set forth in paragraph (f)(3) of this section, or to meet the specific tagging requirements of other OSHA standards.

(ii) This paragraph (f) does not apply to construction, maritime or agriculture.

(2) Definitions. "Biological hazard" or "BIOHAZARD" means those infectious agents presenting a risk of death, injury or illness to employees.

"Major message" means that portion of a tag's inscription that is more specific than the signal word and that indicates the specific hazardous condition or the instruction to be communicated to the employee. Examples include: "High Voltage," "Close Clearance," "Do Not Start," or "Do Not Use" or a corresponding pictograph used with a written text or alone.

"Pictograph" means a pictorial representation used to identify a hazardous condition or to convey a safety instruction.

"Signal word" means that portion of a tag's inscription that contains the word or words that are intended to capture the employee's immediate attention.

"Tags" means a device usually made of card, paper, pasteboard, plastic or other material used to identify a hazardous condition.

(3) Use. Tags shall be used as a means to prevent accidental injury or illness to employees who are exposed to hazardous or potentially hazardous conditions, equipment or operations which are out of the ordinary, unexpected or not readily apparent. Tags shall be used until such time as the identified hazard is eliminated or the hazardous operation is completed. Tags need not be used where signs, guarding or other positive means of protection are being used.

(4) General tag criteria. All tags shall meet the following criteria:

(i) Tags shall contain a signal word and a major message.

(A) The signal word shall be either "Danger," "Caution," or "Biological Hazard," "BIOHAZARD," or the biological hazard symbol.

(B) The major message shall indicate the specific hazardous condition or the instruction to be communicated to the employee.

(ii) The signal word shall be readable at a minimum distance of five feet (1.52 m) or such greater distance as warranted by the hazard.

(iii) The tag's major message shall be presented in either pictographs, written text or both.

(iv) The signal word and the major message shall be understandable to all employees who may be exposed to the identified hazard.

(v) All employees shall be informed as to the meaning of the various tags used throughout the workplace and what special precautions are necessary.

(vi) Tags shall be affixed as close as safely possible to their respective hazards by a positive means such as string, wire, or adhesive that prevents their loss or unintentional removal.

(5) Danger tags. Danger tags shall be used in major hazard situations where an immediate hazard presents a threat of death or serious injury to employees. Danger tags shall be used only in these situations.

(6) Caution tags. Caution tags shall be used in minor hazard situations where a non-immediate or potential hazard or unsafe practice presents a lesser threat of employee injury. Caution tags shall be used only in these situations.

(7) Warning tags. Warning tags may be used to represent a hazard level between "Caution" and "Danger," instead of the required "Caution" tag, provided that they have a signal word of "Warning," an appropriate major message, and otherwise meet the general tag criteria of paragraph (f)(4) of this section.

(8) Biological hazard tags.

(i) Biological hazard tags shall be used to identify the actual or potential presence of a biological hazard and to identify equipment, containers, rooms, experimental animals, or combinations thereof, that contain or are contaminated with hazardous biological agents.

(ii) The symbol design for biological hazard tags shall conform to the design shown below:

[Image Omitted]

(9) Other tags. Other tags may be used in addition to those required by this paragraph (f), or in other situations where this paragraph (f) does not require tags, provided that they do not detract from the impact or visibility of the signal word and major message of any required tag.

[39 FR 23502, June 27, 1974, as amended at 43 FR 49749, Oct. 24, 1978; 43 FR 51759, Nov. 7, 1978; 49 FR 4322, Feb. 10, 1984; 51 FR 33260, Sept. 19, 1986; 61 FR 5508, Feb. 13, 1996; 61 FR 9239, March 7, 1996]

**APPENDIX G**

U.S. Department of Labor

Occupational Safety and Health Administration

Citation and Notification of Penalty

Ft. Worth Area Office
U.S. Department of Labor—OSHA
8713 Airport Freeway, Suite 430
Fort Worth, TX 76180

The violation(s) described in this Citation are alleged to have occurred on or about the day the inspection was made unless otherwise indicated within the description given below:

1. Type of Violation
   Serious
2. Citation Numbers
   01
3. Issuance Date
   03/04/92
4. Inspection Number
   013371662
5. Reporting ID
   0636900
6. CSHO ID
   M3042
7. Optional Report No.
   1198
8. Page No.
   2 of 2
9. To:

   Chapparral Steel Company and its successors
   300 Ward Road
   Midlothian, TX 76065

10. Inspection Date(s):
11/12/91-03/03/92

11. Inspection Site:
300 Ward Road
Midlothian, Tex 76065

* * * *

12. Item Number

13. Standard, Regulation or Section of the Act Violated

29 CFR 1910.145(c)(3): Safety instruction sign(s) were not used where there was a need for general instructions and suggestions relative to safety measuse(s).

14. Description

a. At the West end of the retaining wall used for alloy storage. No warning sign was posted to instruct employees of hazard of being caught between moving box cars and the retaining wall.

15. Date by Which Violation Must Be Abated
03/10/92

16. Penalty
5000.00

17. Area Director
J. T. Knorpp

18. Fine
$10,000.00

NOTICE TO EMPLOYEES—The law gives an employee or a representative the opportunity to object to any abatement date set for a violation if he believes the date to be unreasonable. The contest must be mailed to the U.S. Department of Labor Area Office at the address shown within 15 working days (excluding weekends and federal

holidays) of the receipt by the employer of this Citation and penalty.

EMPLOYER DISCRIMINATION UNLAWFUL—The law prohibits discrimination by an employer against an employee for filing a complaint or for exercising any rights under this Act. An employee who believes that he has been discriminated against may file a complaint no later than 30 days after the discrimination with the U.S. Department of Labor Area Office at the address shown above.

* * * *

## APPENDIX H

UNITED STATES OF AMERICA
OCCUPATIONAL SAFETY AND HEALTH
REVIEW COMMISSION

OSHRC DOCKET No. 92-0942

---

SECRETARY OF LABOR
*Complainant,*

v.

CHAPARRAL STEEL COMPANY
*Respondent.*

---

ORDER

On April 20, 1993, the parties filed a joint motion for leave to amend complaint, an amended complaint and a settlement agreement. The motion for leave to amend the complaint is granted and the amended complaint is received into the record.

The parties have submitted a settlement agreement pursuant to Rule 100 of the Rules of Procedure. The agreement meets the requirements of the Commission for hospitable consideration of settlements. No objection has been received from affected employees. The settlement agreement is approved and incorporated herein by reference.

So ORDERED.

/s/ E. Carter Botkin
E. CARTER BOTKIN
Administrative Law Judge

Date: May 10, 1993

Case Name: Chapparal Steel Company

OSHRC Docket No.: 92-0942

Employer:

Steven R. McCown, Esq.
Littler, Mendelson, Fastiff & Tichy
300 Crescent Court, Suite 600
Dallas, Texas 75201

I hereby certify that a copy of the decision in this case has been mailed to the parties whose names and addresses appear on this notice, by first class mail.

/s/ Illegible

Date: 5/10/93

Regional Solicitor:

Ernest A. Burford, Esq.
Office of the Solicitor
U.S. Department of Labor
525 So. Griffin Street
Suite 501
Dallas, TX 75202

Authorized Employee Representative:

Daniel J. Mick, Esq.
Counsel for Regional Trial Litigation
Office of the Solicitor, USDOL
200 Constitution Ave., NW—Rm S4004
Washington, D.C. 20210

UNITED STATES OF AMERICA
OCCUPATIONAL SAFETY AND HEALTH
REVIEW COMMISSION

---

OSHRC Docket No. 92-0942

---

SECRETARY OF LABOR
*Complainant,*

v.

CHAPARRAL STEEL COMPANY AND ITS SUCCESSORS
*Respondent.*

---

# SETTLEMENT AGREEMENT

Come now complainant and respondent and submit the following settlement agreement pursuant to Rule 2200.100 of the Commission's Rules of Procedure:

This settlement agreement specifies the terms of settlement as set out below for each contested item and disposes of all issues in the case.

Affected employees have not filed objections to the reasonableness of any abatement time.

1. Complainant agrees to amend the following item:

   Citation Number: 1; Item: 1; CFR Standard: § 5(a)(1) of the Act; Penalty: $5,000.00; Violation/Abatement Date: 3/10/92

Amended to Read

Citation 1, Item 1: Section 5(a)(1) of the Occupational Safety and Health Act of 1970: The employer did not furnish employment and a safe place of employment which was free from recognized hazards that were causing or

likely to cause death or serious physical harm to employees in that employees were exposed to the following:

a. The employer did not instruct employees on the recognized hazard which existed in the area located at the loading dock west of the melt shop on or about November 11, 1991. Among other methods, one feasible and acceptable method to correct this hazard is to instruct employees not to enter the area and institute and enforce an "absolute work rule" which prohibits employees from being in the area of the hazard when rail box cars are present.

2. Complainant moves to amend Items No. 1 and 2 of Citation No. 1, wherein a total penalty of $10,000.00 is proposed, to propose a total penalty of $5,000.00

3. Upon the granting of complainant's motion(s), respondent moves to withdraw its notice of contest.

4. Upon the entry of a final order of the Commission approving this settlement agreement, respondent promises to pay the total penalty assessed by the Commission.

5. Respondent states that the conditions described in Items No. 1 and 2 of Citation No. 1 have been corrected by instituting an "absolute work rule" against employees working in areas such as those described in the above mentioned citation. In addition to an absolute work rule, respondent has conducted training on the hazards associated with working in areas such as the one mentioned above. Respondent has installed warning signs to alert its employees that the area in question can be hazardous and to avoid the area when rail cars are present.

6. None of the foregoing agreements, statements, stipulations, and actions taken by respondent shall be deemed an admission by respondent of the allegation(s) contained within the citation(s), notification(s) of penalty and the complaint herein or as may be amended. The agreements, statements, stipulations, and actions taken herein are

made for the purpose of settling this matter economically and amicably.

7. Respondent certifies that the affected employees in the above-styled case are not represented by an authorized employee representative.

8. Respondent certifies that a copy of this settlement agreement has been served upon the unrepresented affected employees in the manner set forth in Rule 2200.100 of the Commission's Rules of Procedure, by posting same on the 19th day of April, 1993.

9. Each party hereby agrees to bear its own fees and other expenses incurred by such party in connection with any stage of this proceeding.

JUDITH E. KRAMER
Deputy Solicitor of Labor

JAMES E. WHITE
Regional Solicitor

JACK F. OSTRANDER
Counsel for Safety and Health

CHAPARRAL STEEL COMPANY

By: /s/ Steven R. McCown
STEVEN R. MCCOWN
Attorney

Signed this 14th day of April, 1993.

LITTLER, MENDELSON, FASTIFF & TICHY
300 Crescent Court, Suite 600
Dallas, Texas 75201

Attorney for Respondent.

By: /s/ Ernest A. Burford
ERNEST A. BURFORD
Attorney

Signed this 17th day of April, 1993.

U.S. DEPARTMENT OF LABOR
Office of the Solicitor
525 Griffin Street, Suite 501
Dallas, Texas 75202

Telephone: 214-767-4902

Attorneys for Complainant

Supreme Court, U.S.
F I L E D
JUN 10 1998
CLERK

No. 97-1837

IN THE
**SUPREME COURT OF THE UNITED STATES**
OCTOBER TERM, 1997

CHAPARRAL STEEL COMPANY
*Petitioner,*

vs.

STATE OF TEXAS
*Respondent.*

ON PETITION FOR A WRIT OF CERTIORARI
TO THE TENTH COURT OF APPEALS FOR
THE STATE OF TEXAS

# RESPONDENT'S BRIEF IN OPPOSITION

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*Counsel of Record

June, 1998

## QUESTION PRESENTED

Whether Texas is preempted from enforcing its railroad clearance statute governing distances between railroad tracks and adjacent structures by virtue of a prior settlement agreement between an employer and the Department of Labor based on a violation of the general duty clause of the Occupational Safety and Health Act.

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IN THE
**SUPREME COURT OF THE UNITED STATES**
OCTOBER TERM, 1997

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CHAPARRAL STEEL COMPANY
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ON PETITION FOR A WRIT OF CERTIORARI
TO THE TENTH COURT OF APPEALS FOR
THE STATE OF TEXAS

---

# RESPONDENT'S BRIEF IN OPPOSITION

---

Respondent, State of Texas, by and through its attorney, the Attorney General of Texas, respectfully requests that this Court deny the Petition for Writ of Certiorari ("Petition") filed by Chaparral Steel Company ("Chaparral"), seeking review of an unreported state-court opinion entitled *State of Texas v. Chaparral Steel Company* from the Tenth Court of Appeals for the State of Texas.[1] Chaparral's petition for review by the Texas Supreme Court was denied.

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[1] Respondent State cites to statements in Chaparral's Petition as "Pet. at ___" and items contained in the appendix to the Petition as "Pet. App. at ____a." Cites to the appendix in this brief in opposition will be to "App.__ at ____a."

## Constitutional and Statutory Provisions Involved

The Supremacy Clause contained in Article VI of the U.S. Constitution is involved in this case concerning federal preemption of state law. The relevant federal statutory provisions are 29 U.S.C. §§ 654, 655, and 657 of the Occupational Safety and Health Act and 29 C.F.R. 1910.145(c)(3).

The relevant state statutory provision is the Texas Clearance Act, contained in Texas Revised Civil Statutes, articles 6559a-f. The federal and state provisions, except for 29 U.S.C. §655 are reproduced in Chaparral's petition, App. D-F Pet. App. at 12a-29a. Section 655 of the OSH Act is set out in this brief as Appendix A. App. at 1a-9a.

## Statement of the Case

On November 9, 1991, a Chaparral employee was crushed to death between a train and a retaining wall on the premises of the Chaparral plant. An investigation by the Texas Railroad Commission ("Commission") was initiated when the Commission was contacted by an investigator of the Occupational Safety & Health Administration ("OSHA") and informed that inadequate clearance may have been a contributing cause of a fatal accident. App. B at 10a. The Texas Railroad Clearance statute ("Clearance law") requires certain minimum distances between tracks and adjacent and overhead structures. TEX. REV. CIV. STAT. ANN. arts. 6559a-f (West 1926). The OSHA investigator invited the Commission to review OSHA's preliminary accident investigation findings and participate in a meeting with Chaparral officials on November 25, 1991. Measurements taken on that date revealed clearances from the retaining wall to the centerline of the track between 5'8" and 5'11". The Clearance law requires a minimum horizontal

distance of eight and one half feet. TEX. REV. CIV. STAT. ANN. arts. 6559b. Commission inspectors attempted to schedule an inspection of the entire plant but were prevented access by Chaparral's attorney. App. B at 11a.

The State filed a lawsuit against Chaparral on January 15, 1993[2], seeking penalties for Chaparral's failure to comply with the provisions of the clearance law. On May 14, 1993, the state filed a request for production of documents and for inspection of premises. The Commission inspectors were allowed access to the premises on July 28, 1993, and completed an inspection report identifying eleven violations of the Clearance law throughout the Chaparral plant.

Meanwhile, OSHA issued a citation based on inspections that occurred between November 12, 1991, and March 3, 1992. The citation described the violation as follows: "At the West end of the retaining wall used for alloy storage. No warning sign was posted to instruct employees of hazard of being caught between moving box cars and the retaining wall." *Id.* The citation listed the "Standard, Regulation or Section of the Act Violated" as follows: "29 C.F.R. §1910.145(c)(3)[3]: Safety instruction sign(s) were not used where there was a need for general instructions and suggestions relative to safety measure(s)." *Id.* The Department of Labor and Chaparral subsequently agreed to a settlement of this citation as a violation of the general duty clause[4] of the Occupational Safety and Health Act ("OSH Act"). The settlement agreement dated April 14, 1993, states:

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[2] Chaparral erroneously states on page 4 of its petition that the State's lawsuit was filed on September 23, 1993. Pet. at 4.

[3] 29 C.F.R.§1910.145(c)(3) is reproduced in Petitioner's Appendix F. Pet. App. at 23a-29a.

[4] 29 U.S.C. §654.

> The employer did not furnish employment and a safe place of employment which was free from recognized hazards that were causing or likely to cause death or serious physical harm to employees in that employees were exposed to the following: a. The employer did not instruct employees on the recognized hazard which existed in the area located at the loading dock west of the melt shop on or about November 11, 1991.

Pet. App. at 35a-37a. Chaparral agreed to pay $5,000 in addition to implementing an "absolute work rule," training employees concerning similar hazards, and installing warning signs.

A description of the proceedings below is contained in Chaparral's petition. Pet. 6-8.

## Summary of the Argument

The Clearance law provides that areas around railroad tracks must be clear of obstacles within minimum horizontal and vertical distances of the tracks. Chaparral argues that by enactment of the OSH Act the federal government has nullified the State's power to enforce time-honored law. However, pursuant to the clear language of the OSH Act, the states are not preempted unless the Secretary of Labor ("Secretary") has promulgated standards on the particular subject at issue. Chaparral cannot cite any promulgated standard regarding railroad clearances, or any other indicia of Congressional intent to preempt the Clearance law. Until OSHA or some other federal agency promulgates rules for railroad clearances, the state is free to make and enforce laws on this issue.

## Reasons Why the Petition Should be Denied

A. Employers' incentive to cooperate with, participate in and reach settlements after federal OSHA investigations will not be affected by this decision.

The unreported decision by the Texas Tenth Court of Appeals is unlikely to have a widespread effect on employers across the nation. More importantly, employers have sufficient incentive to cooperate with federal OSHA investigations and reach settlements with or without further judicial clarification on preemption. The more realistic danger is that under Chaparral's theory of "settlement as a standard," employers who violate state laws would be encouraged to negotiate settlement agreements with OSHA under the general duty clause for relatively small sums as a means of gaining immunity against state law enforcement of specific standards. Such a circumvention of state police powers cannot be assumed as the intent of Congress.

The allegation that a twenty million dollar windfall to the State might occur is an inaccurate and irrelevant characterization of fines and penalties set by the Texas Legislature. Pet. at 16. Civil fines and penalties are not windfalls, but a mode of punishing lawbreakers as old as law itself. The possibility that a fact finder may determine that Chaparral's violations are so egregious as to warrant the maximum penalty is irrelevant to whether the State's enforcement of this law is a proper exercise of its authority.

The Clearance law provides for penalties of not less than $100 nor more than $1,000 per violation calculated per day of each violation. TEX. REV. CIV. STAT. ANN. art. 6559e. In responses to requests for admissions, Chaparral admitted to distances that violate the Clearance law during particular time periods including up to the date of the admissions. Multiplying the number of days for each of Chaparral's admitted violations

by $100, then, by $1,000, yields a range of $312,000 to $20,340,000. The fact finder could assess penalties in any amount within this range.

Chaparral's suggestion that the Commission combed its statutes for stale laws to enforce is erroneous. Pet. at 16. While no appellate decisions from years past have been found on the subject of enforcing the Clearance law, the Commission has regulated companies with railroad tracks continuously under the Clearance law since its effective date in 1926. Companies routinely comply voluntarily by requesting deviations under article 6559f [5] of the clearance statute whenever their operations fail to comply with the letter of the law. By final order of the Railroad Commission, deviations are granted on the condition that certain compensatory safety measures are implemented.[6] The fact that clearance issues are handled administratively rather than judicially is indicative of the widespread acceptance of this law by Texas industry.

Neither the citation issued by OSHA nor the settlement agreement between the Department of Labor and Chaparral make any mention of a clearance standard or even raise the issue of improper clearances. In addition, it was an OSHA employee who notified the Commission of the possible clearance violation and invited the state inspectors to review his preliminary investigation findings and participate in a meeting with Chaparral

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[5] It is further provided that upon application regularly made and filed, and after notice to the Attorney General, the Railroad Commission may, for good cause shown, permit any railway company or other corporation, firm, partnership, or person, or any county or municipality to deviate from the terms of this Act in accordance with an order of the Commission made and entered. . . .

TEX. REV. CIV. STAT. ANN. art. 6559f. [Entire text reproduced in Pet. App. at 15a.]

[6] An example of an order requesting a deviation from the Clearance provisions is contained in Appendix C.

officials. App. B at 10a. There is absolutely no showing that OSHA believed its jurisdiction was exclusive in this situation or that it had any standards concerning clearances that had been violated.

Moreover, to the extent that OSHA "regulated" anything at all, it is only in the area where the employee was killed. The OSHA citation and settlement involve no other part of the Chaparral plant. In its lawsuit, the State is addressing eleven violations of the Clearance law, only one of which was involved in the accident on November 9, 1991.

B. The Tenth Court of Appeals' decision will not have a substantial impact on issues already regulated by federal occupational safety and health standards.

The decision that the Clearance law is not preempted by the OSH Act will have no effect on federal occupational safety and health standards in the field of railroad clearances because no standards on the issue of track clearances have been promulgated by the Secretary. Chaparral obfuscates the issue by stating that OSHA determined that any hazard created by inadequate clearance between Chaparral's retaining wall and its rail tracks was regulated by the safety instruction sign standard in 29 C.F.R. §1910.145(c)(3). Pet. at 15-16. Neither the citation nor the settlement agreement evidence such a determination and the facts concerning the investigation indicate that OSHA believed the Commission regulated track clearances.

Chaparral complains that the Clearance law is a blunt, heavy-handed, and wasteful vehicle for achieving a safe workplace, and that OSHA possesses the expertise and the authority to implement appropriate remedies to achieve the goal of workplace safety. Pet. at 13. OSHA, however, has not implemented standards relating to track clearances. It is reasonable to assume that OSHA, by virtue of its expertise, has not promulgated clearance standards because it has determined

that the states are in a better position to regulate this particular hazard. The fact that OSHA employees called the Commission to investigate conditions at the Chaparral plant manifests approval of the Clearance law and the Commission's enforcement of this issue.

C. There is no evidence of Congressional intent to preempt the Clearance law.

Under the Supremacy Clause, any state law, however clearly within a state's acknowledged power, which interferes with or is contrary to federal law must yield. *Felder v. Casey*, 487 U.S. 131, 138, 108 S.Ct. 2302, 2307 (1988). Preemption will not lie, however, unless it is "the clear and manifest purpose of Congress." *Rice v. Santa Fe Elevator Corp.* 331 U.S. 218, 230, 67 S.Ct. 1146, 1152 (1947).

Thus, whether or not a certain state action is preempted by federal law is a question of congressional intent. *Gade v. Nat'l Solid Wastes Management Ass'n*, 505 U.S. 88, 112 S.Ct. 2374 (1992). Congress can supersede state laws in three ways. First, Congress can expressly state that the particular federal law preempts state law. *Jones v. Rath Packing Co.*, 430 U.S. 519, 525, 97 S.Ct. 1305, 1309 (1977). Second, Congressional intent to preempt can be implied where the scheme of federal preemption is so pervasive as to make reasonable the inference that Congress left no room for the states to supplement it. This is called field preemption. *Rice*, 331 U.S. at 230, 67 S.Ct. at 1152. Third, the implication that Congress intended to preempt state law is found where compliance with both federal and state regulations is a physical impossibility or where state law stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress. This is referred to as conflict preemption. *Florida Lime & Avocado Growers, Inc. v. Paul*, 373 U.S. 132, 142-143, 83 S.Ct. 1210, 1217-1218 (1963).

Congressional intent concerning preemption is expressed clearly in the OSH Act as follows:

> Nothing in this chapter shall prevent any State agency or court from asserting jurisdiction under State law over any occupational safety or health issue *with respect to which no standard is in effect under section 655* of this title.

29 U.S.C. § 667(a) (West 1985) (emphasis added). In *Gade*, this Court characterized section 667(a) as a savings clause, which saves from preemption any state law regulation of an occupational safety and health issue with respect to which no federal standard is in effect. *Gade*, 505 U.S. at 99, 112 S.Ct. at 2384. Congress anticipated that OSHA would not create standards on every single workplace hazard and allowed the states freedom to legislate where no federal standards promulgated under section 655 exist. Section 655 of the OSH Act describes the procedures for promulgation by the Secretary. 29 U.S.C. § 665. App. A at 1a.

Chaparral cannot identify a standard promulgated by the Secretary on the issue of railroad clearance. Instead, it contends that a settlement agreement between itself and the Department of Labor is a standard. In relying on the fruit of administrative negotiation, rather than a promulgated regulation, Chaparral's contention reflects a fundamental misunderstanding of the differences between the rulemaking and adjudicative processes in administrative law. Chaparral's line of reasoning amounts to an argument that since OSHA *did something*, the State's laws are preempted.

Not only is a settlement agreement not a standard, but also, the settlement was based on a violation of §654, the general duty clause of the OSH Act, which provides that an employer shall keep a safe workplace. The general duty clause is not a standard in effect under §655; it is not a preemptive standard but

rather a provision to fall back on where *no promulgated standards apply*. *Brennan v. Butler Lime and Cement Co.*, 520 F.2d 1011, 1017-18 n.9 (7th Cir. 1975). In regard to the general duty clause, the Fifth Circuit has recently stated:

> It is well-settled that the Secretary has essentially two weapons in its arsenal of enforcement. First, the Secretary may issue a citation for violations of specific standards promulgated (through rulemaking) by the Secretary. Alternatively, where the Secretary has not promulgated standards, he may rely on the General Duty Clause as a "catchall provision."

*Reich v. Arcadian Corp.*, 110 F.3d 1192, 1196 (5th Cir. 1997), citing *Pratt & Whitney Aircraft, Div. of United Technologies Corp. v. Secretary of Labor*, 649 F.2d 96, 98 (2d Cir. 1981). The general duty clause is not a standard promulgated by the Secretary under §655.

D. Approval of the Clearance law by the Secretary is not required under the reasoning of *Gade*.

The vehicle for Chaparral's erroneous contention that the State was required to obtain the Secretary's approval of the Clearance law under the reasoning of *Gade* is its mischaracterization of the general duty clause as a promulgated standard.

At issue in *Gade* were OSHA regulations entitled "Hazardous Waste Operations in Emergency Response," which were specific requirements for dealing with the dangers associated with hazardous waste. Similarly, the State of Illinois had enacted laws concerning specific requirements for the training, testing, and licensing of hazardous waste site workers. The state plan was extensive, thoroughly developed, and

subjected employers and employees to an additional set of standards. The Court found that the state laws were duplicative of the federal regulations, and held that if the state had wanted to regulate its hazardous waste workers with standards other than those promulgated by OSHA, approval from the Secretary should have been sought under § 667(b), which requires:

> Any State, which, at any time, desires to assume responsibility for development and enforcement therein of occupational safety and health standards relating to any occupational safety or health issue with respect to which a *Federal standard has been promulgated under section 655* of this title shall submit a State plan for the development of such standards and their enforcement.

29 U.S.C. § 667(b) (emphasis added).

Nothing similar is at issue in this case. The state clearance law requires minimal distances from the center line of the track and other structures, while the OSH Act's general duty clause requires employers to provide a generally safe workplace. No duplicative or inconsistent regulation exists; the Clearance law does not supplement federal standards concerning track clearances. The State has issued standards where none exist in federal law. As noted by the Texas Court of Appeals in the instant case,

> If Chaparral had complied with the [Clearance law] Act, the hazardous condition would not have existed to trigger a citation for violating the general duty an employer has to maintain a safe working environment.

Pet. App. at 8a.

*Gade* does not address the general duty clause. Whether the general duty clause preempted state law was an issue in *Puffer's Hardware, Inc. v. Donovan*, 742 F.2d 12 (1st Cir. 1984). In *Puffer's*, OSHA held that the employer and owner of a hardware store had committed a serious violation of the general duty clause when he failed to install electronically interlocked gates on the freight elevator and on the openings to the shaft, a feasible safety measure. The employer contended that state law requiring such measures exempted his building and that his compliance with applicable state law provided a complete defense. The administrative law judge rejected the defense, ruling that the OSH Act preempted the state law. Upon appeal, the reviewing court held that the state law was *not* preempted, noting an absence of conflict. Since no federal standard governed elevator safety, the state statute on the issue was not preempted. The court held, nevertheless, that the employer violated the general duty clause, recognizing that state regulation of a safety hazard and the general duty clause can co-exist and regulate the same condition.

E. There is no confusion in this case regarding the majority opinion in *Gade*.

Chaparral complains that the confusion created by the differences of the justices on the issue of preemption analysis, implied versus express, has caused the lower courts to overlook the "scope" of OSH Act preemption adopted by the Court in *Gade*. Chaparral complains that courts, such as the Texas Court of Appeals, have and will fall prey to this confusion. Pet. at 9.

The Texas Court of Appeals was not confused. The scope of the OSH Act is not so great as to preempt the Clearance law contrary to an express savings clause. Section 667(a) of the act clearly leaves the way open for state regulations regarding any occupational safety or health issue *with respect to which no standard has been promulgated by the*

*Secretary*. Since there has been no federal standard promulgated on the issue of railroad clearance, the states are specifically and expressly authorized to legislate.

Chaparral asks the Court to hold that the general duty clause was intended to occupy the entire field of occupational safety and health issues, in the face of clear, express language to the contrary. If such were the case, Congress would not have, in the same act, expressly permitted states to legislate where no standards exist. 29 U.S.C. §667(a). As the Texas Court of Appeals pointed out,

> Indeed, it would not make sense for the general duty clause to supersede all specific standards enacted by state authorities to encourage the kind of workplace that OSHA regulations were attempting to ensure.

Pet. App. at 8a.

Only Chaparral is confused as to the application of *Gade*. The case does not apply to the facts of this case because there is no applicable federal standard. The general duty clause is not a standard and the State of Texas does not need to obtain approval from the Secretary when a standard does not exist.

F. The Texas Court of Appeals' Opinion does not conflict with this Court's majority analysis in *Gade*.

Chaparral contends that the opinion of the Texas Court of Appeals *implies* that the court determined that preemption could not apply because the Clearance law is a general state statute with only an incidental effect on federal workplace regulations. Pet. at 12. Chaparral's analysis assumes that the Texas Court of Appeals upheld the Clearance law despite the existence of a federal standard because the Clearance law is generally applicable to tracks, not specifically to those at

workplaces. On the basis of this assumption, Chaparral argues that such an analysis would have been improper because this Court has stated that a statute should be analyzed by its impact rather than the professed purpose. Pet. 12-13.

Nothing in the Texas court's opinion, however, is even faintly suggestive of this line of reasoning. The Texas court simply found that there was no federal standard in effect that would preempt the Clearance law, whatever its impact and professed purpose. A standard is a rule that must be promulgated by the Secretary pursuant to section 655 of the OSH Act. The fruit of administrative resolution of a citation after negotiation between a single employer and the Department of Labor is not a standard.

## Conclusion

For these reasons, the State of Texas requests that Chaparral's Petition for Writ of Certiorari be denied.

Respectfully submitted,

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June, 1998

# APPENDIX

# APPENDIX A

## UNITED STATES CODE ANNOTATED
## TITLE 29. LABOR
## CHAPTER 15 OCCUPATIONAL SAFETY AND HEALTH

### § 655. Standards

**(a) Promulgation by Secretary of national consensus standards and established Federal standards; time for promulgation; conflicting standards**

Without regard to chapter 5 of Title 5 or to the other subsections of this section, the Secretary shall, as soon as practicable during the period beginning with the effective date of this chapter and ending two years after such date, by rule promulgate as an occupational safety or health standard any national consensus standard, and any established Federal standard, unless he determines that the promulgation of such a standard would not result in improved safety or health for specifically designated employees. In the event of conflict among any such standards, the Secretary shall promulgate the standard which assures the greatest protection of the safety or health of the affected employees.

**(b) Procedure for promulgation, modification, or revocation of standards**

The Secretary may by rule promulgate, modify, or revoke any occupational safety or health standard in the following manner:

**(1)** Whenever the Secretary, upon the basis of information submitted to him in writing by an interested person, a representative of any organization of employers or employees, a nationally recognized standards-producing

organization, the Secretary of Health and Human Services, the National Institute for Occupational Safety and Health, or a State or political subdivision, or on the basis of information developed by the Secretary or otherwise available to him, determines that a rule should be promulgated in order to serve the objectives of this chapter, the Secretary may request the recommendations of an advisory committee appointed under section 656 of this title. The Secretary shall provide such an advisory committee with any proposals of his own or of the Secretary of Health and Human Services, together with all pertinent factual information developed by the Secretary or the Secretary of Health and Human Services, or otherwise available, including the results of research, demonstrations, and experiments. An advisory committee shall submit to the Secretary its recommendations regarding the rule to be promulgated within ninety days from the date of its appointment or within such longer or shorter period as may be prescribed by the Secretary, but in no event for a period which is longer than two hundred and seventy days.

**(2)** The Secretary shall publish a proposed rule promulgating, modifying, or revoking an occupational safety or health standard in the Federal Register and shall afford interested persons a period of thirty days after publication to submit written data or comments. Where an advisory committee is appointed and the Secretary determines that a rule should be issued, he shall publish the proposed rule within sixty days after the submission of the advisory committee's recommendations or the expiration of the period prescribed by the Secretary for such submission.

**(3)** On or before the last day of the period provided for the submission of written data or comments under paragraph (2), any interested person may file with the Secretary written objections to the proposed rule, stating the grounds therefor and requesting a public hearing on such objections. Within

thirty days after the last day for filing such objections, the Secretary shall publish in the Federal Register a notice specifying the occupational safety or health standard to which objections have been filed and a hearing requested, and specifying a time and place for such hearing.

**(4)** Within sixty days after the expiration of the period provided for the submission of written data or comments under paragraph (2), or within sixty days after the completion of any hearing held under paragraph (3), the Secretary shall issue a rule promulgating, modifying, or revoking an occupational safety or health standard or make a determination that a rule should not be issued. Such a rule may contain a provision delaying its effective date for such period (not in excess of ninety days) as the Secretary determines may be necessary to insure that affected employers and employees will be informed of the existence of the standard and of its terms and that employers affected are given an opportunity to familiarize themselves and their employees with the existence of the requirements of the standard.

**(5)** The Secretary, in promulgating standards dealing with toxic materials or harmful physical agents under this subsection, shall set the standard which most adequately assures, to the extent feasible, on the basis of the best available evidence, that no employee will suffer material impairment of health or functional capacity even if such employee has regular exposure to the hazard dealt with by such standard for the period of his working life. Development of standards under this subsection shall be based upon research, demonstrations, experiments, and such other information as may be appropriate. In addition to the attainment of the highest degree of health and safety protection for the employee, other considerations shall be the latest available scientific data in the field, the feasibility of the standards, and experience gained under this and other health

and safety laws. Whenever practicable, the standard promulgated shall be expressed in terms of objective criteria and of the performance desired.

**(6) (A)** Any employer may apply to the Secretary for a temporary order granting a variance from a standard or any provision thereof promulgated under this section. Such temporary order shall be granted only if the employer files an application which meets the requirements of clause (B) and establishes that (i) he is unable to comply with a standard by its effective date because of unavailability of professional or technical personnel or of materials and equipment needed to come into compliance with the standard or because necessary construction or alteration of facilities cannot be completed by the effective date, (ii) he is taking all available steps to safeguard his employees against the hazards covered by the standard, and (iii) he has an effective program for coming into compliance with the standard as quickly as practicable. Any temporary order issued under this paragraph shall prescribe the practices, means, methods, operations, and processes which the employer must adopt and use while the order is in effect and state in detail his program for coming into compliance with the standard. Such a temporary order may be granted only after notice to employees and an opportunity for a hearing: *Provided*, That the Secretary may issue one interim order to be effective until a decision is made on the basis of the hearing. No temporary order may be in effect for longer than the period needed by the employer to achieve compliance with the standard or one year, whichever is shorter, except that such an order may be renewed not more than twice (I) so long as the requirements of this paragraph are met and (II) if an application for renewal is filed at least 90 days prior to the expiration date of the order. No interim renewal of an order may remain in effect for longer than 180 days.

**(B)** An application for a temporary order under this paragraph (6) shall contain:

**(i)** a specification of the standard or portion thereof from which the employer seeks a variance,

**(ii)** a representation by the employer, supported by representations from qualified persons having firsthand knowledge of the facts represented, that he is unable to comply with the standard or portion thereof and a detailed statement of the reasons therefor,

**(iii)** a statement of the steps he has taken and will take (with specific dates) to protect employees against the hazard covered by the standard,

**(iv)** a statement of when he expects to be able to comply with the standard and what steps he has taken and what steps he will take (with dates specified) to come into compliance with the standard, and

**(v)** a certification that he has informed his employees of the application by giving a copy thereof to their authorized representative, posting a statement giving a summary of the application and specifying where a copy may be examined at the place or places where notices to employees are normally posted, and by other appropriate means.

A description of how employees have been informed shall be contained in the certification. The information to employees shall also inform them of their right to petition the Secretary for a hearing.

**(C)** The Secretary is authorized to grant a variance from any standard or portion thereof whenever he determines, or the Secretary of Health and Human Services certifies, that such variance is necessary to permit an employer to participate in an experiment approved by him or the Secretary of Health and Human Services designed to demonstrate or validate new and

improved techniques to safeguard the health or safety of workers.

**(7)** Any standard promulgated under this subsection shall prescribe the use of labels or other appropriate forms of warning as are necessary to insure that employees are apprized of all hazards to which they are exposed, relevant symptoms and appropriate emergency treatment, and proper conditions and precautions of safe use or exposure. Where appropriate, such standard shall also prescribe suitable protective equipment and control or technological procedures to be used in connection with such hazards and shall provide for monitoring or measuring employee exposure at such locations and intervals, and in such manner as may be necessary for the protection of employees. In addition, where appropriate, any such standard shall prescribe the type and frequency of medical examinations or other tests which shall be made available, by the employer or at his cost, to employees exposed to such hazards in order to most effectively determine whether the health of such employees is adversely affected by such exposure. In the event such medical examinations are in the nature of research, as determined by the Secretary of Health and Human Services, such examinations may be furnished at the expense of the Secretary of Health and Human Services. The results of such examinations or tests shall be furnished only to the Secretary or the Secretary of Health and Human Services, and, at the request of the employee, to his physician. The Secretary, in consultation with the Secretary of Health and Human Services, may by rule promulgated pursuant to section 553 of Title 5, make appropriate modifications in the foregoing requirements relating to the use of labels or other forms of warning, monitoring or measuring, and medical examinations, as may be warranted by experience, information, or medical or technological developments acquired subsequent to the promulgation of the relevant standard.

**(8)** Whenever a rule promulgated by the Secretary differs substantially from an existing national consensus standard, the

Secretary shall, at the same time publish in the Federal Register a statement of the reasons why the rule as adopted will better effectuate the purposes of this chapter than the national consensus standard.

**(c) Emergency temporary standards**

**(1)** The Secretary shall provide, without regard to the requirements of chapter 5 of Title 5, for an emergency temporary standard to take immediate effect upon publication in the Federal Register if he determines (A) that employees are exposed to grave danger from exposure to substances or agents determined to be toxic or physically harmful or from new hazards, and (B) that such emergency standard is necessary to protect employees from such danger.

**(2)** Such standard shall be effective until superseded by a standard promulgated in accordance with the procedures prescribed in paragraph (3) of this subsection.

**(3)** Upon publication of such standard in the Federal Register the Secretary shall commence a proceeding in accordance with subsection (b) of this section, and the standard as published shall also serve as a proposed rule for the proceeding. The Secretary shall promulgate a standard under this paragraph no later than six months after publication of the emergency standard as provided in paragraph (2) of this subsection.

**(d) Variances from standards; procedure**

Any affected employer may apply to the Secretary for a rule or order for a variance from a standard promulgated under this section. Affected employees shall be given notice of each such application and an opportunity to participate in a hearing. The Secretary shall issue such rule or order if he determines on the record, after opportunity for an inspection where appropriate

and a hearing, that the proponent of the variance has demonstrated by a preponderance of the evidence that the conditions, practices, means, methods, operations, or processes used or proposed to be used by an employer will provide employment and places of employment to his employees which are as safe and healthful as those which would prevail if he complied with the standard. The rule or order so issued shall prescribe the conditions the employer must maintain, and the practices, means, methods, operations, and processes which he must adopt and utilize to the extent they differ from the standard in question. Such a rule or order may be modified or revoked upon application by an employer, employees, or by the Secretary on his own motion, in the manner prescribed for its issuance under this subsection at any time after six months from its issuance.

**(e) Statement of reasons for Secretary's determinations; publication in Federal Register**

Whenever the Secretary promulgates any standard, makes any rule, order, or decision, grants any exemption or extension of time, or compromises, mitigates, or settles any penalty assessed under this chapter, he shall include a statement of the reasons for such action, which shall be published in the Federal Register.

**(f) Judicial review**

Any person who may be adversely affected by a standard issued under this section may at any time prior to the sixtieth day after such standard is promulgated file a petition challenging the validity of such standard with the United States court of appeals for the circuit wherein such person resides or has his principal place of business, for a judicial review of such standard. A copy of the petition shall be forthwith transmitted by the clerk of the

court to the Secretary. The filing of such petition shall not, unless otherwise ordered by the court, operate as a stay of the standard. The determinations of the Secretary shall be conclusive if supported by substantial evidence in the record considered as a whole.

**(g) Priority for establishment of standards**

In determining the priority for establishing standards under this section, the Secretary shall give due regard to the urgency of the need for mandatory safety and health standards for particular industries, trades, crafts, occupations, businesses, workplaces or work environments. The Secretary shall also give due regard to the recommendations of the Secretary of Health and Human Services regarding the need for mandatory standards in determining the priority for establishing such standards.

# APPENDIX B

## OFFICE OF RAILROAD COMMISSION OF TEXAS

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MEMORANDUM

**TO:** Mike Calhoun

**FROM:** Robert Pedersen

**DATE:** December 9, 1991

**SUBJECT:** Employee Fatality Investigation

The attached employee fatality investigation report was prepared in response to an accident occurring November 9, 1991, at the Chaparral Steel facility in Midlothian, Texas. The deceased, Mr. Charles E. Schindler, was fatally injured when pinned between a retaining wall and a box car during a railroad switching operation within the confines of the plant. The investigation was conducted to determine whether failure to comply with the Texas Clearance Law was a factor in the fatal accident.

Commission rail safety inspectors conduct Clearance Law inspections incidental to regular inspection activities or in response to complaints. This investigation was initiated when Mike Calhoun was contacted by the Occupational Safety & Health Administration (OSHA) and informed that inadequate clearance may have been a contributing cause of a fatal accident. Mr. C.E. Moore, an investigator with OSHA, invited the Commission to review OSHA's preliminary accident

investigation findings and participate in a meeting with Chaparral Officials on November 25, 1991.

Measurements taken November 25, 1991, at the location where the accident occurred, revealed that the structure involved in the accident and an adjacent loading dock were in violation of the Texas Clearance Law. The extent of the clearance impairment is recorded in the attached accident report. I was unable to document the inspection with photographs on November 25, 1991, so I planned to conduct a subsequent clearance inspection of the accident site and other areas within the plant for compliance with the Texas Clearance Law. When I attempted to schedule the plant inspection, I was denied access to the property by Mr. Steven McCowan, an attorney representing Chaparral Steel.

Information contained in the employee fatality investigation report was obtained from OSHA, Chaparral Steel employees and records, inspection of the accident site and public records.

## EMPLOYEE FATALITY INVESTIGATION

**Company:** Chaparral Steel

**Location:** 300 Ward Road, Midlothian, Texas

**Date, Time:** November 9, 1991; 4:30 p.m.

**Probable Cause:** Injuries experienced due to being pinned between retaining wall and railroad box car.

**Employee:**
Name.....Charles E. Schindler
Occupation .....Switchman
Age .....34 years
Length of Service.....7 years 2 months

## Description of Accident Site

At the accident site, a railroad track runs west to east with a loading dock parallel to the track on the south side. From the west end of the loading dock a retaining wall was constructed to form part of a holding area for the storage of alloys. The retaining wall is a concrete bridge truss in the shape of an I-beam. Its dimensions are approximately 17'3½" (length) x 72" (height) x 10" (width) at its widest part.

On the north side of the retaining wall (between the wall and the railroad tracks) steel braces have been placed to support the retaining wall. The braces are at approximately 15° angles leaning away from the tracks. The top of the braces are attached to the wall, with the bottom of the brace extending approximately 10 inches from the base of the wall and anchored to a concrete slab. The range of vision in this area is not obstructed. The dock and tracks were constructed in 1975, the retaining wall was completed (in house) October 9, 1991.

## The Accident

Rail cars are received by Chaparral from the Atchison, Topeka and Santa Fe Railroad. All switching operations within the confines of company property are performed by Chaparral employees. On the day of the accident, the deceased, Mr. Charles E. Schindler, was working as a switchman. Other members of the crew included locomotive operator Mr. Clarence Finley, trainee Claude Garrett and operator Bobby Nix. All members of the crew had gone to work at 7:00 a.m. on November 9, 1991.

The crew of four (4) employees were engaged in shoving 17 rail box cars, attached to the locomotive, east, in the process of placing 2 cars loaded with carbon graphite (coke) at the loading dock on the west side of the melt shop. Mr. Clarence Finley was operating the locomotive and Mr. Charles Schindler

was the switchman positioning the cars at the dock using 2-way radio communications with the locomotive.

According to the Midlothian Police Department, the locomotive operator, Mr. Finley, was moving the cars into position while Mr. Schindler was giving instructions. The final instruction relayed by Mr. Schindler was to tell Mr. Finley to stop. Mr. Finley applied the locomotive brakes and awaited further instructions Mr. Schindler's job once the train was stopped was to uncouple the cars. After a short time, when no further instructions were heard, Mr. Finley attempted to make radio contact with Mr. Schindler. When he received no response, he asked Mr. Bobby Nix, operator, who was riding in the cab of the locomotive, to go check on Mr. Schindler. Mr. Nix left the cab and started to the area. Mr. Claude Garrett, trainee, who was riding on the front of the locomotive, accompanied Mr. Nix. Upon arriving at the loading dock area, Mr. Schindler was found pinned between a rail car and the alloy bin retaining wall. The rail car that had Mr. Schindler pinned was the second car from the east end. Rescue assistance was summoned and Mr. Schindler was freed at 4:52 p.m. by moving the car away from the dock using a porta-power (a large hydraulic jack).

After Mr. Schindler was freed, he was transported by ambulance to Baylor Medical Center in Waxahachie where he passed away at 7:48 p.m. Death was attributed to blunt trauma to upper torso.

**Clearance Obstructions at the Accident Site**

The distance between the loading dock and the center line of the track is less than the required minimum of 8'6" prescribed by the Texas Clearance law. The east end of the dock is approximately 5'11" from the center line of the track and the west end is approximately 5'8" from the track center line.

The distance between the retaining wall of the holding area for the storage of alloys and the center line of the track is less than the required minimum of 8'6" prescribed by the Texas Clearance Law. The retaining wall at its widest section is approximately 6'8" from the center line of the track. The distance from the base of the wall's steel support braces to the track center line is approximately 5 ' 10 ".

**Chaparral's Knowledge of Clearance Law**

Chaparral officials stated that they were unaware of the Texas Clearance Law. According to Mr. Victor Swaim, a company official responsible for employee safety, and Mr. Harry Borowczak, General Manager, the dock and the retaining wall were constructed to conform with American Railway Engineer's Association side clearance standards.

There are no signs, lights, reflective tape or other means of advance warning of close side clearance in the area of the dock and the retaining wall. Mr. Swaim stated that working conditions in this area were not viewed as hazardous. Chaparral Steel's General Plant Safety Rules & Information contains a section entitled "Railroad Hazards." There is no mention of hazards to employee safety associated with inadequate clearance between rail cars and obstructions to the side or above railroad tracks.

# APPENDIX C

## RAILROAD COMMISSION OF TEXAS
## TRANSPORTATION/GAS UTILITIES DIVISION

DOCKET NO. 0003699ZZCL DATE ISSUED: FEBRUARY 28, 1995

APPLICATION OF J.L. PROLER IRON & STEEL COMPANY FOR PERMISSION TO DEVIATE FROM THE TERMS OF THE TEXAS CLEARANCE LAW AT 4401 CLINTON DRIVE, HOUSTON, TEXAS 77020.

## FINAL ORDER

In conference at its office in Austin, Texas, the Railroad Commission of Texas ("the Commission") finds that after statutory notice was given to the public and to all interested parties, and after no protest was filed, the above-styled application was processed on an expedited basis by an examiner who prepared the findings of fact and conclusions of law incorporated in this order. The Commission makes the following findings of fact and conclusions of law in connection with said application:

## FINDINGS OF FACT

1. J.L. Proler Iron & Steel Company (the "applicant") operates a scrap metal processing facility at Houston, Texas ("the facility"). The facility ships its product by the Southern Pacific Railroad.

2. The facility has a large custom built machine above a railroad track that is used to crush steel turnings (the "crusher").

3. The crusher was designed to efficiently load steel crushings into a railroad gondola (an open top, low sided rail car) without spillage.

4. The crusher encroaches into the area regulated by the Railroad Commission of Texas under the Texas Clearance Law [Tex. Rev. Civ. Stat. Ann. Art. 6559(a)-(f) Vernon-Supp. 1926]. The distance from the centerline of the track to the crusher is 5'-9". The distance from the top of the rail to the bottom of the crusher is 10'-0".

5. The design and dimensions of the crusher are justified by engineering considerations and operational requirements. The crusher's encroachment into the regulated area is a function of those engineering considerations and operational requirements.

6. The application has not been protested by the United Transportation Union representing railroad switching personnel or any labor organization representing employees within the facility.

## CONCLUSIONS Of LAW

1. Tex. Rev. Civ. Stat. Ann. Art. 6559(a)-(f) [Vernon-Supp. 1926] requires that structures and other objects adjacent to or above a railroad track be placed no less than 22 feet above the top of the rails and no less than 8 ½ feet from the center of the track. However, the Commission may permit applicants to deviate from those requirements when good cause has been shown.

2. The Commission concludes, based on the above findings, that good cause has been shown by J.L. Proler Iron & Steel Company for permission to deviate from the dimensional requirements of the Texas Clearance Law at its facility located at Houston, Texas. The Commission also concludes that the

safety of persons at the facility will not be diminished by the granting of the application, provided that proper safety precautions are taken by the applicant. Accordingly, the Commission orders that the application be granted, subject to the following conditions:

(1) Two signs reading "Caution: Reduced Clearances, No person on or in rail car during movement" shall be placed in a conspicuous place adjacent to the railroad track, a reasonable distance from the crusher (one sign at each end of the track).

(2) Signs required by (1) above shall be lighted during nighttime switching operations.

(3) Signs required herein shall not extend into the area regulated by the Texas Clearance Law.

(4) The railroad serving the facility shall be given written notification of the reduced clearances attributable to the encroachments specified herein.

(5) The applicant shall instruct all existing and new employees at its facility concerning safe work practices in conjunction with the movement of rail cars through the crusher.

(6) The applicant shall supervise the movement of the rail cars through the crusher to ensure that no person is riding on or in a rail car, and that no person is standing close enough to the track in the vicinity of the crusher to be caught between the crusher and a moving rail car.

Permission granted to J.L Proler Iron & Steel Company to deviate from the dimensional requirements of the Texas Clearance Law shall not be effective until a notarized statement of compliance has been sent to:

Section Manager
Rail Safety
Transportation/Gas Utilities Division
Railroad Commission of Texas
Capitol Station
P.O. Box 12967
Austin, TX 78711-2967

The Commission will have the right to inspect the facility of J. L. Proler Iron & Steel Company after receiving written notice of compliance stating that the conditions in this Order have been met.

**RAILROAD COMMISSION OF TEXAS**

/s/ BARRY WILLIAMSON
Chairman

Attest:

/s/ KIM WILLIAMSON
Secretary

/s/ CHARLES R. MATTHEWS
Commissioner

/s/ CAROLE KEETON RYLANDER
Commissioner

(3)

No. 97-1837

FILED
AUG 25 1998
OFFICE OF THE CLERK
SUPREME COURT, U.S.

IN THE
# Supreme Court of the United States
OCTOBER TERM, 1997

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CHAPARRAL STEEL COMPANY,
*Petitioner,*

v.

STATE OF TEXAS,
*Respondent.*

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**On Petition for a Writ of Certiorari to the Tenth Court of Appeals for the State of Texas**

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## PETITIONER'S REPLY MEMORANDUM

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## PETITIONER'S REPLY MEMORANDUM

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### INTRODUCTION

Respondent State of Texas' *Brief in Opposition* relies extensively on a single, unsupported premise: that a settlement reached between petitioner Chaparral Steel Company and the Occupational Safety and Health Administration somehow converted a citation for violation of two separate federal standards into a citation only for violation of the "general duty clause" contained within the Occupational Safety and Health Act, 29 U.S.C. § 654(a). Respondent's faulty premise contradicts both the opinion of the Tenth Court of Appeals for the State of Texas, which is the order at issue, and OSHA's own records.

## ARGUMENT ON REPLY

### A. Respondent State of Texas argues that the settlement reached between petitioner and OSHA deletes a prior citation for violation of 29 C.F.R. § 1910.145(c)(3) and rests entirely on violation of the OSH Act's general duty clause.

As drafted by respondent State of Texas, the *Question Presented* in this case involves "a prior settlement agreement between an employer and the Department of Labor based on a violation of the general duty clause of the Occupational Safety and Health Act." *Respondent's Brief in Opposition* ("Opp.") at page (i). According to the State of Texas, "the settlement was based on a violation of [29 U.S.C.] § 654, the general duty clause of the OSH Act, which provides that an employer shall keep a safe workplace." Opp. at 9.[1] From this premise, the State of Texas argues that the general duty clause "is not a preemptive standard but rather a provision to fall back on where no promulgated standards apply." Opp. at 9-10 (emphasis omitted).

### B. Respondent's premise contradicts the Texas Tenth Circuit Court of Appeals' findings.

Respondent's premise—that the settlement reached between Chaparral Steel Company and OSHA was based solely on the OSH Act's general duty clause and not also on 29 C.F.R. § 1910.145(c)(3)—does not accurately reflect the Texas Tenth Court of Appeals' ruling in this case. The Texas court acknowledged that Chaparral Steel Company settled the entire underlying OSHA citation, which identified both the general duty clause and the specific standard set forth at 29 C.F.R. § 1910.145(c)(3), by reaching a settlement and agreeing to both fines and

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[1] *Also see* Opp. at 3 ("the [parties] subsequently agreed to a settlement of this citation as a violation of the general duty clause").

affirmative remedial action. *Petitioner's Appendix* ("Pet. App.") at 4a, 31a.

**C. Respondent's premise also misinterprets the *Settlement Agreement* reached between Chaparral Steel Company and OSHA.**

**1. The *Settlement Agreement* reached between Chaparral Steel Company and OSHA continues to cite violation of *both* the general duty clause and the specific standard set by 29 C.F.R. § 1910.145(c)(3).**

Respondent's premise also misinterprets the settlement reached between Chaparral Steel Company and OSHA. The *Settlement Agreement* amended "Item 1" of the citation to include an erroneously omitted reference to the OSH Act's general duty clause. *See* Citation Item Number 01 (Pet. App. 30a at No. 2). It did not amend "Item 2" of the citation, which identified the basis for a second citation as "29 CFR 1910.145(c)(3)." *See* Citation Item Number 02 (Pet. App. 31a at Nos. 12, 13). The State of Texas is confused by the language amending Citation Item No. 01, perhaps because it was not a party to the *Settlement Agreement*. But a careful reading of the *Settlement Agreement* shows that it did not *delete* the original citation's reference to 29 CFR § 1910.145(c)(3) despite *adding* an express reference to the OSH Act's general duty clause.

**2. OSHA's records confirm that the *Settlement Agreement* reached between Chaparral Steel Company and OSHA did not dismiss the citation for violation of 29 C.F.R. § 1910.145(c)(3).**

OSHA's own records confirm that the State of Texas has misinterpreted the *Settlement Agreement*. These records are maintained in an extensive database and are available via OSHA's Internet site. That database contains a comprehensive Establishment Search Inspection Detail ("ESID") describing events following its inspection

of conditions at Chaparral Steel Company's Midlothian facility.[2]

The ESID contains a "violation summary" including, at its top, a section indicating two "Nr Violations." These violations are set forth in a section titled "Violation Items," which includes a description of each violation found, cited and penalized. This section identifies two separate violations, including violations of *both* the general duty clause *and* 29 C.F.R. § 1910.145(c)(3). The "Inspection Detail Definitions" indicate quite clearly that the standards identified under "Nr Violations" do not include "violations which were deleted due to a settlement or judicial action."[3]

Another form from the database, titled "Violation—Chaparral Steel Company," explains that petitioner was cited for a violation of section 1910.145(c)(3) and that, on the date that the violation was settled, the penalty for violation was reduced from $5,000 to $2,500—half the total penalty paid under the settlement agreement.[4] A similar page describes the initial citation for violation of the general duty clause and its subsequent settlement for a separate $2,500 penalty.[5]

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[2] This "Establishment Search Inspection Detail" can be viewed directly at http://www.osha.gov/cgi-bin/est/est1xp?i=103371662. A printed copy of this web page has been lodged for the Court's convenience as Exhibit A to the *Items Lodged in Support of Petitioner's Reply Memorandum.*

[3] The "Inspection Detail Definitions" can be viewed directly at http://www.osha.gov/oshstats/est1def.html. A printed copy of this web page has been lodged for the Court's convenience as Exhibit B to the *Items Lodged in Support of Petitioner's Reply Memorandum.*

[4] This "Violation Information" can be viewed directly at http://www.osha.gov/cgi-bin/est/est1vd?10337166201002. A printed copy of this web page has been lodged for the Court's convenience as Exhibit C to the *Items Lodged in Support of Petitioner's Reply Memorandum.*

[5] This "Violation Information" can be viewed directly at http://www.osha.gov/cgi-bin/est/est1vd?10337166201001. A printed copy

Accordingly—despite the State of Texas' confusion on this issue—OSHA's own records clearly indicate that, in the settlement, Chaparral Steel Company agreed not to contest and paid penalties on citations for violation of *both* the general duty clause *and* the specific federal standard set by 29 C.F.R. § 1910.145(c)(3).

## CONCLUSION

As demonstrated above, and despite the State of Texas' attempt to recharacterize the citations levied against Chaparral Steel Company by the federal Occupational Safety and Health Administration, this case does not involve a *Settlement Agreement* based solely "on a violation of the general duty clause of the Occupational Safety and Health Act." Rather, this case involves citations issued under both the general duty clause and the specific standard set forth at 29 C.F.R. § 1910.145(c)(3). Because application of the latter standard preempts Texas' attempt to regulate the same conditions under state law, and for each of the reasons set forth in its opening brief, Chaparral Steel Company respectfully requests that its *Petition for Writ of Certiorari* be granted.

Respectfully submitted,

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August 25, 1998

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of this web page has been lodged for the Court's convenience as Exhibit D to the *Items Lodged in Support of Petitioner's Reply Memorandum.*